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Supreme Court of the United States

OCTOBER TERM, 1916

Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF FOR PETITIONER JOSEPH S. FAY

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BRIEF FOR PETITIONER JOSEPH S. FAY

I.

The Opinions of the Courts Below

The *per curiam* opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 521), is officially reported at 270 App. Div. 261, 59 N. Y. S. (2d) 127.

The Court of Appeals of the State of New York affirmed the judgment of the Appellate Division without opinion and its memorandum of the case is officially reported at 296 N. Y. 510. In this memorandum, as well as in its remittitur (R. 533-534), the Court of Appeals stated: "Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendants argued that the decision of the Trial Court in granting the motion of the People for a special

jury and in overruling the challenge of defendants to the special jury panel constituted a denial of due process and a violation of their rights under the Fourteenth Amendment of the Constitution of the United States. This Court held that the granting of the motion of the People for a special jury and the overruling of the challenge of the defendants to the special jury panel was not a denial of due process or a violation of defendants' rights under the Fourteenth Amendment to the Constitution of the United States."

II.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 *U. S. C. A.* § 344).

III.

Statement of the Case

A.

On May 17, 1943, an indictment (R. 4-13) was filed against the petitioner, Vice-President of the International Union of Operating Engineers (R. 15), and James Bove, Vice-President of the International Hod Carriers, Building and Common Laborers' Union of America, charging them with conspiracy to commit and with actual commission of the crime of extortion by obtaining sums of money from contractors engaged in the construction of the Delaware Water Supply Project in the State of New York through fear induced by threats to these contractors of unlawful injury to their property if the sums of money were not paid. The indictment contained one conspiracy count and six counts charging substantive offenses of extortion against six

different contractors. The indictment was filed in the Court of General Sessions for the County of New York, and upon petitioner's motion, the trial of the indictment was transferred to the Supreme Court of the State of New York (R. 19-20).

Petitioner and James Bove were tried before a court and a so-called "special" jury. They were found guilty of the crime of conspiracy as charged in count one of the indictment, and of the crime of extortion as charged in count seven; the jury found them not guilty on counts two, three, and five, and not guilty by direction of the Court on count four (R. 17, 494, 476-477). The jury was unable to reach a verdict with respect to count six (R. 17, 494).

On April 5, 1945, petitioner was sentenced upon the conspiracy count to a term of one year in the City Penitentiary, and fined $500.00; and, on the extortion count, to a term in the State Prison of not less than seven and one-half nor more than fifteen years, the sentences to be served consecutively (R. 18-19).

The questions here raised relate to the propriety, under the Fourteenth Amendment of the Federal Constitution, of trying petitioner by the special jury.

Section 749-aa of the *Judiciary Law* of the State of New York, which authorizes the County Clerk of New York County to empanel special jurors, is set forth in this brief as Appendix A.

Sections 590-608 of the *Judiciary Law* of the State of New York, the law relating to jurors generally in New York County, is set forth in this brief as Appendix B.

The rules of the Appellate Division, First and Second Departments, relating to the jury system in the City of New York (except those relating to the grand jury), and adopted pursuant to Section 592 of the *Judiciary Law*, are set forth in this brief as Appendix C.

Over petitioner's objection (R. 27-30), and on motion of the District Attorney for New York County (R. 21),

the Court ordered that petitioner be tried by a special jury (R. 30-31).

Petitioner thereupon challenged the special jury panel. This challenge is set forth in full at R. 32-34. It was there claimed, among other things, that Section 749-aa of the *Judiciary Law* was unconstitutional and void both on its face and as applied to petitioner in this case in that it violated the equal protection of the laws and due process of law clauses of the Fourteenth Amendment of the Federal Constitution. Specifically, petitioner contended that the special jurors had been selected with a purpose to exclude and discriminate against laborers, persons of humble station in life, and women, and with a purpose to obtain persons of conservative views, persons of the upper economic and social stratum in New York County, persons having a tendency to convict defendants accused of crime, and to exclude those who might understand the point of view of the laboring man. Petitioner contended, further, that Section 749-aa of the *Judiciary Law* vests in the County Clerk and his subordinates an unlimited and arbitrary discretion in the matter of selecting special jurors, and that in practice in this case these officials did act in an arbitrary and capricious manner.

Testimony was taken on the challenge to the special jury panel. The Court thereafter denied the challenge, to which petitioner's counsel excepted (R. 85). After the jury rendered its verdict, petitioner renewed his challenge to the special jury panel in support of his motion to set aside the verdict and in arrest of judgment (R. 503, 506), both of which were denied (R. 507).

Petitioner then appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of conviction, and from each and every part thereof, and from each and every intermediate order therein (R. 2), thereby bringing up for review the order denying the challenge to the special jury panel (R. 1). While the

Federal questions here raised were fully argued before the Appellate Division, that Court said nothing about these questions in its *per curiam* opinion (R. 521-525), nor were they treated in the opinion of the dissenting justices (R. 526-529).

Petitioner then appealed to the Court of Appeals of the State of New York from every part of the judgment of the Appellate Division and appealed specifically, among other matters, from the order overruling his challenge to the special jury panel (R. 515-516). The Court of Appeals affirmed the judgment without opinion (296 N. Y. 510). In its memorandum and remittitur, however, it stated (*supra*, pp. 1-2) that it had considered and passed on petitioner's contentions involving the Fourteenth Amendment of the Federal Constitution.

B.

We turn now to the facts relating to the merits of petitioner's appeal.

While the panel of special jurors in New York County is separate and distinct from the panel of general jurors in the County (R. 40-41), both have their source in the list of persons who are called to come to the office of the Division of Jurors of New York County to be examined for general jury duty (R. 41).

The Division of Jurors obtains names of prospective jurors from the Federal census list, registration lists, tax lists, telephone directories, and the like (R. 42, 75).[1] Summonses are sent to persons whose names are thus obtained, requiring them to appear at the office of the Division of Jurors to be examined for jury duty (R. 43).

However, while women are equally eligible with men to serve on juries in the State of New York (*Judiciary Law*,

[1] This is governed by Section 594 of the *Judiciary Law*, see Appendix B herein, page 10.

§ 596, see Appendix B herein, pp. 10-11), and have been since September, 1937 (Laws of 1937, c. 513), the Division of Jurors never sends a notice to a woman to appear to be examined for jury duty (R. 75). It accepts for jury duty only such women as happen to learn of their privilege to serve on juries and who voluntarily come to the office of the Division of Jurors and ask to be considered for jury duty (R. 75).

The Division of Jurors makes a concerted effort, however, to secure such women volunteers from what the official in charge of the Division described as "civic conscious" organizations, such as the League of Women Voters (R. 43, 75). The officials of the Division of Jurors solicit lists of prospective women jurors from these "civic conscious" organizations and make speeches at meetings of these organizations urging the members to serve as jurors (R. 43).

When the prospective juror to whom the summons has been sent arrives at the office of the Division of Jurors, he is given a questionnaire to fill out (R. 43). This questionnaire is in evidence as Defendant's Exhibit D-1 (R. 508A-B, 42) and is substantially the same as that authorized by the rules of the Appellate Division (see Appendix C, pp. 30-35). The rules of the Appellate Division require that every person appearing for examination as a juror shall fill out, sign and swear to this questionnaire (see Appendix C, p. 19), and such is the practice (R. 43-44).

After the prospective juror fills out his questionnaire, he takes it to one of the three examining clerks in the Division of Jurors (R. 44), who, as required by law (*Judiciary Law*, § 595, Appendix B herein, p. 10, Rules of the Appellate Division, Appendix C herein, p. 20), personally interviews him, checks his police record, and accepts or rejects him for general jury duty on the basis of the questionnaire, the interview, and the police record.

The necessary qualifications of general trial jurors are set forth in Section 596 of the *Judiciary Law* (Appendix B

herein, pp. 10-11). To qualify as a juror a person must be an American citizen and a resident of the County; not less than 21 nor more than 70 years old; the owner, or the spouse of an owner, of property of the value of $250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or a misdemeanor involving moral turpitude; intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

We come now to the manner of selecting special jurors from among those qualified to serve as general jurors.

There is no law or rule or regulation whatever to guide or govern the officials of the Division of Jurors in selecting special jurors. James McGurrin, the Deputy County Clerk in charge of the Division of Jurors, testified that "There are really no rules" (R. 41), and was emphatic that there was nothing whatever in the statutes relating to special jurors or in the rules laid down by the Appellate Division to govern or guide the Division of Jurors (R. 52).

However, by one simple expedient the officials in the Division of Jurors eliminate from special jury duty 90% of all persons summoned for jury duty.

The questionnaire previously referred to (Defendant's Exhibit D-1, R. 508A), contains the following question:

> "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months)....."

While this question obviously demands an answer, every person who answers it is, without warning or notice, and for the reason alone of having answered it, excluded from the special jury panel (R. 49-50, 66-67).

In this manner about 90% of all persons summoned for jury duty are excluded from special jury service (R. 49-50, 57).

The persons who do not follow this seemingly mandatory direction to name two or more months are accepted

or rejected by the examining clerks for special jury duty, according to the testimony of the official in charge of the Division of Jurors, depending on the "degree of intelligence as revealed by the questionnaire" (R. 44-45).

Those persons whom the examining clerks accept as special jurors are, unlike those chosen for general jury duty, sent to see either Mr. McGurrin, the Deputy County Clerk in charge of the Division of Jurors, or Thomas F. Kane, a Deputy County Clerk assigned to the Division of Jurors (R. 50, 75). Mr. McGurrin testified that he gave the special juror only "a cursory examination," since he relied mainly on the way the examining clerk viewed the person (R. 57-58). However, he testified that he did inquire about the person's business experience and education (R. 51, 59).

As for Mr. Kane, Mr. McGurrin testified that he gave Mr. Kane no instructions, that "Mr. Kane is eminently qualified to act, without any instructions. He has had a lot of experience" (R. 52). Mr. Kane testified that he asked the special jurors the questions contained in the questionnaire (R. 76).

In this manner a panel of about 3,000 special jurors is maintained (R. 41, 74), as compared to the approximately 60,000 jurors on the general jury panel (R. 40, 74).[2]

Of the approximately 3,000 members of the special jury panel, only 25-30 are women (R. 65, Defendant's Exhibit D-2, R. 509, 83). About 7,000 of the 60,000 general jurors are women (R. 65).

The special jury panel thus selected, and from which petitioner's jury was drawn, is composed primarily of bankers, manufacturers, executives, stock brokers, and the

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[2] A "Comparative Statement of Activities", issued by the County Clerk, New York County (see *New York Law Journal*, August 15, 1946, page 1) shows that in the fiscal year 1944-1945, 197 persons qualified as special jurors, and that in the fiscal year 1945-1946, 108 persons so qualified.

like. Not a single laborer, or factory worker, or service employee has succeeded in finding a place on the special jury panel and the number of craftsmen and foremen included is nominal (Defendant's Exhibit D-2, R. 509).

While it needs no demonstration that there are in New York County (which is coextensive with the Borough of Manhattan, City of New York) many thousands of laborers, factory workers, service workers, and craftsmen and foremen, such fact is readily shown in the 1940 Federal Census of Population Report which classifies the occupations of all the residents of New York County who are employed, or, being experienced, are seeking work.

For the 1940 Census of Population Reports, the following classifications of occupations were used: (1) professional and semi-professional; (2) proprietors, managers and officials; (3) clerical, sales and kindred workers; (4) craftsmen, foremen and kindred workers;[3] (5) operatives

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[3] This category includes (see 1940 Census of Population, Volume II, part 1, p. 17):

Bakers; Blacksmiths, forgemen and hammermen; boilermakers; Brickmasons, stonemasons, and tile setters; Carpenters; Compositors and typesetters; Decorators and window dressers; Electricians; Foremen (not elsewhere classified); Inspectors (not elsewhere classified); Jewelers, watchmakers, goldsmiths, and silversmiths; Locomotive engineers; Locomotive firemen; Machinists, millwrights, and tool makers; Mechanics and repairmen; Molders, metal; Painters, construction and maintenance; Paperhangers; Pattern and model makers, except paper; Plasterers; Plumbers and gas and steam fitters; Roofers and slaters; Sawyers; Shoemakers and repairers (not in factory); Stationary engineers, cranemen, hoistmen, etc.; Tailors and tailoresses; Tinsmiths, coppersmiths, and sheet metal workers; Upholsterers; Cabinetmakers; Cement and concrete finishers; Electrotypers and stereotypers; Engravers (except photoengravers); Furriers; Glaziers; Heat treaters, annealers, and temperers; Inspectors, scalers, and graders, log and lumber; Loom fixers; Millers, grain, flour, feed, etc.; Opticians and lens grinders and polishers; Photoengravers and lithographers; Piano and organ tuners; Pressmen and plate printers, printing; Rollers and roll hands, metal; Stonecutters and stone carvers; Structural and ornamental metal workers.

and kindred workers;[4] (6) service workers;[5] (7) laborers, except farm; (8) farmers, farm managers, farm laborers.

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[4] This category includes (see 1940 Census of Population, Vol. II, part 1, p. 17):

Apprentices; Attendants, filling station, parking lot, garage, and airport; Brakemen, railroad; Chauffeurs and drivers, bus, taxi, truck, and tractor; Conductors, bus and street railway; Deliverymen; Dressmakers and seamstresses (not in factory); Filers, grinders, buffers, and polishers, metal; Firemen, except locomotive and fire department; Furnacemen, smeltermen, and pourers; Heaters, metal; Laundry operatives and laundresses, except private family; Linemen and servicemen, telegraph, telephone, and power; Meat cutters, except slaughter and packing house; Mine operatives and laborers; Motormen, street, subway, and elevated railway; Painters, except construction and maintenance; Sailors and deck hands, except U. S. Navy; Switchmen, railroad; Welders and flamecutters; Asbestos and insulation workers; Blasters and powdermen; Boatmen, canalmen, and lock keepers; Chainmen, rodmen, and axmen, surveying; Dyers; Fruit and vegetable graders and packers, except in cannery; Milliners (not in factory); Motion picture projectionists; Motormen (vehicle), mine, factory, logging camp, etc.; Oilers, machinery; Photographic process workers; Power station operators; Operatives and kindred workers (not elsewhere classified).

A large proportion of the "operatives and kindred workers" resident in Manhattan are to be found under "Operatives and kindred workers (not elsewhere classified)", which includes operatives engaged in industrial manufacturing. It appears, for example, that of the 128,253 employed "operatives and kindred workers" resident in Manhattan, 59,565 are employed in industrial manufacturing, 30,428 alone being engaged in the manufacture of apparel and other fabricated textile products. (see 1940 Census of Population, Vol. III, part 4, pp. 364-365).

[5] This category includes (see 1940 Census of Population, Vol. II, part 1, p. 17):

Service Workers, Except Domestic: Firemen, fire department; Guards, watchmen, and doorkeepers; Policemen and detectives; Soldiers, sailors, marines, and coast guards; Marshals and constables; Sheriffs and bailiffs; Watchmen (crossing) and bridge tenders; Barbers, beauticians, and manicurists; Bartenders; Boarding house and lodginghouse keepers; Charwomen and cleaners; Cooks, except private family; Elevator operators; Housekeepers, stewards, and hostesses, except private family; Janitors and sextons; Porters; Practical nurses and midwives; Servants, except private family; Waiters and waitresses, except private family; Attendants, hospital and other institution; Attendants, professional and personal service (not elsewhere classified); Attendants, recreation and amusement; Bootblacks; Ushers, amusement place or assembly.

Domestic Service Workers: Housekeepers, private family; Laundresses, private family; Servants, private family.

The Bureau of Labor Statistics of the United States Department of Labor, at the request of petitioner's attorneys, prepared the following table conforming the classifications of employment shown on Defendant's Exhibit D-2 (R. 509) to the Census classifications:

TABLE 1

NUMBER OF SPECIAL JURORS ON FILE IN NEW YORK COUNTY CLERK'S OFFICE, ACCORDING TO SURVEY ON JANUARY 31, 1945, GROUPED TO CORRESPOND AS WELL AS POSSIBLE WITH CLASSIFICATIONS OF THE 1940 CENSUS OF POPULATION.

Total number		2,911
Professional and semiprofessional workers		501
Architects and engineers	229	
Educators, teachers and librarians	27	
Newspaper men, editorial writers and others engaged in the dissemination of information	148	
Entertainers	26	
Chemists and physicists	66	
Attorneys	5	
Proprietors, managers, and officials, except farm		1,146
Manufacturers	106	
Executives, managers of industrial enterprises	470	
Retail merchants	144	
Building and construction superintendents	70	
Labor union representatives	1	
Bankers	170	
Stock brokers	185	

Clerical, sales and kindred workers		1,012
Insurance men*	166	
Real estate brokers*	117	
Salesmen, promoters of business enterprises and advertising men*	438	
Travel agency men	10	
Auditors and accountants	166	
Office clerks	94	
Civil service employees**	21	
Craftsmen, foremen and kindred workers		5
Mechanics	5	
Not in the labor force		82
Housewives	20	
Retired	62	
Unclassifiable		165***

* Some members of this group probably belong in the preceding classification, "Proprietors, managers and officials, except farm".

** Some members of this group undoubtedly belong elsewhere, as under service trades, or laborers.

*** There appears to be a mistake somewhere in the addition in "Defendants' Exhibit D-2". To obtain a correct total we have removed 3 from the "Unclassifiable" item.

The Bureau of Labor Statistics, at the request of petitioner's attorneys, also prepared a table comparing, by using the Census figures, the representation of the various occupational groups on the special jury panel with their numerical relation to the working resident population of New York County as a whole.

TABLE 2

Occupations of Employed Persons (Except on Public Emergency Work) and of Experienced Workers Seeking Work, Residing in Manhattan in the week of March 24 to 30, 1940, compared with Occupations of Special Jurors on File in New York County Clerk's Office, January 31, 1945.

Occupation	Experienced Labor Force [a]						Special Jurors
	Total			Males			
	Total	Employed [c]	Seeking work, experienced	Total	Employed [c]	Seeking work, experienced	
	A	B	C	D	E	F	G
Total [b]	921,183	778,202	142,981	589,431	489,618	99,813	2,664
ofessional and semiprofessional	111,600	98,343	13,257	61,191	53,416	7,775	501
oprietors, managers and officials	85,969	81,234	4,735	73,732	69,509	4,223	1,146
rical, sales and kindred workers	196,037	169,066	26,971	112,316	95,853	16,463	1,012
aftsmen, foremen and kindred workers	70,497	54,217	16,280	67,504	51,618	15,886	5
eratives and kindred workers	156,581	128,253	28,328	98,493	79,562	18,931	.....
vice workers	254,595	216,992	37,603	131,112	110,157	20,955	.....
orers, except farm	45,375	29,869	15,506	44,578	29,293	15,285	.....
rmers, farm managers, farm laborers	529	228	301	505	210	295	.....
	Percent			Percent			
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0
ofessional and semiprofessional	12.1	12.6	9.3	10.4	10.9	7.8	18.8
oprietors, managers and officials	9.3	10.4	3.3	12.5	14.2	4.2	43.0
rical, sales and kindred workers	21.3	21.7	18.9	19.1	19.6	16.5	38.0
aftsmen, foremen and kindred workers	7.7	7.0	11.4	11.4	10.5	15.9	0.2
eratives and kindred workers	17.0	16.5	19.8	16.7	16.2	19.0	.....
vice workers	27.6	27.9	26.3	22.2	22.5	21.0	.....
orers, except farm	4.9	3.8	10.8	7.6	6.0	15.3	.....
rmers, farm managers, farm laborers	0.1	[d]	0.2	0.1	[d]	0.3	.....

[a] Includes the employed (except those on public emergency work) and experienced workers seeking work. Source: U. S. Bureau of the Census. Sixteenth Census of the United States, 1940, Population, v. III, part 4, New York State Table 10a, pp. 363-365.

[b] Omitting the unclassified, as well as housewives, retired persons, and others not in the labor force.

[c] Except on public emergency work.

[d] Less than one-tenth of one percent.

This table shows that whereas 17% of the total experienced labor force, and 16.7% of the total male experienced labor force, resident in New York County (Manhattan), are "operatives and kindred workers," not one person on the special jury panel belonged to this classification.

The table shows that whereas 27.6% of the total experienced labor force, and 22.2% of the total male experienced labor force, resident in New York County, are "service workers," not a single person on the special jury panel belonged to this classification.

The table shows that while 4.9% of the total experienced labor force, and 7.6% of the total male experienced labor force, resident in New York County, are "laborers, except farm," not one such person was on the special jury panel.

In other words, 49.5% of the total experienced labor force, and 46.5% of the total male experienced labor force, resident in New York County, were totally excluded from the special jury panel.

Moreover, while 7.7% of the total experienced labor force, and 11.4% of the total male experienced labor force, resident in New York County, are craftsmen, foremen, and kindred workers, only 2/10ths of 1% of the special jury panel was so composed.

As against the exclusion of these groups, the special jury panel is overloaded with proprietors, managers and officials. While this group constitutes only 9.3% of the total experienced labor force, and 12.5% of the total male experienced labor force, resident in New York County, it comprises 43% of the special jury panel.

Of the 89 talesmen examined on the *voir dire* at petitioner's trial, only three were members of a labor union. One of these was a member of a company union (R. 114), who was peremptorily challenged by the People (R. 123). Another was a member of the Apartment House and Superintendent Managers' Union (R. 150); and he was likewise peremptorily challenged by the People (R. 155). The other was a gentleman who had retired from the Treasury Department of Union Carbide and Carbon Corporation

at the age of 69, had gone to work with Brooks Brothers six months before the trial, and who on going with Brooks Brothers had become a member of a union, the name of which he did not know, and which he joined, so he testified, because Brooks Brothers had told him that "everybody had to belong to the union" (R. 353-354). This juror was satisfactory to the People but was peremptorily challenged by the defense (R. 355).

IV.

Specification of Errors

The trial court erred in denying petitioner's challenge to the special jury panel inasmuch as:

1. The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, and service employees were systematically, intentionally, and deliberately excluded as such denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

2. The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, and service employees were systematically, intentionally, and deliberately excluded as such denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

3. The trial of petitioner by a jury selected from a panel from which women were systematically, intentionally, and deliberately excluded as such denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

4. The trial of petitioner by a jury selected from a panel from which women were systematically, intentionally, and deliberately excluded as such denied petitioner the due

process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

5. The trial of petitioner by a jury selected from a panel from which women who were not members of so-called "civic conscious" organizations were systematically, intentionally, and deliberately excluded as such denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

6. The trial of petitioner by a jury selected from a panel from which women who were not members of so-called "civic conscious" organizations were systematically, intentionally, and deliberately excluded as such denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

7. The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, service employees, and also women, particularly those not members of so-called "civic conscious" organizations, were systematically, intentionally, and deliberately excluded as such denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

8. The trial of petitioner by the special jury as distinguished from a general, or ordinary jury, denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution, and the statute authorizing the empanelling of special juries (*Judiciary Law*, § 749-aa) is accordingly unconstitutional and void as applied to him.

9. Section 749-aa of the *Judiciary Law* of the State of New York is unconstitutional and void in that it sets forth no standards to guide those charged with the selection of members of the special jury panel and accordingly denies petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

10. Section 749-aa of the *Judiciary Law* of the State of New York is unconstitutional and void as applied to petitioner in that the manner in which members of the special jury panel were selected was unreasonable, arbitrary, and capricious, and denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

V.

ARGUMENT.

FIRST POINT

The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, service employees, and also women, particularly those not members of so-called "civic-conscious" organizations, were systematically, intentionally, and deliberately excluded as such, denied petitioner the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Federal Constitution.

This Court has many times held[6] that the deliberate and intentional exclusion of Negroes from trial juries or grand juries, whether by state statute or by action of state officials, violated the equal protection clause of the Fourteenth Amendment.

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[6] *Strauder* v. *West Virginia*, 100 US 303, 25 L ed 664 (1879); *Neal* v. *Delaware*, 103 US 370, 26 L ed 567 (1880); *Carter* v. *Texas*, 177 US 442, 44 L ed 839, 20 S Ct 687 (1900); *Rogers* v. *Alabama*, 192 US 226, 48 L ed 417, 24 S Ct 257 (1904); *Norris* v. *Alabama*, 294 US 587, 79 L ed 1074, 55 S Ct 579 (1935); *Hollins* v. *Oklahoma*, 295 US 394, 79 L ed 1500, 55 S Ct 784 (1935); *Hale* v. *Kentucky*, 303 US 613, 82 L ed 1050, 58 S Ct 753 (1938); *Pierre* v. *Louisiana*, 306 US 354, 83 L ed 757, 58 S Ct 536 (1939); *Smith* v. *Texas*, 311 US 128, 85 L ed 84, 61 S. Ct 164 (1940); *Hill* v. *Texas*, 316 US 400, 86 L ed 1559, 62 S Ct 1159 (1942).

There can be no doubt that the intentional exclusion of any person or group of persons from jury service on some ground which has no relation to their qualifications to serve as jurors raises a question under the equal protection clause whether the exclusion be based on race, sex, nationality, political, religious, economic, or social belief or position, or any other distinguishable characteristic.

Yick Wo v. *Hopkins*, 118 US 356, 30 L ed 220, 6 S Ct 1064 (1886).

Skinner v. *Oklahoma*, 316 US 535, 86 L ed 1655, 62 S Ct 1110 (1942).

See *American Sugar Refining Co.* v. *Louisiana*, 179 US 89, 92, 45 L ed 102, 103-104, 21 S Ct 43, 44-45 (1900).

It has been held to be a denial of the equal protection of the laws under the Fourteenth Amendment intentionally to exclude from a jury: members of a particular political party, *Commonwealth of Kentucky* v. *Powers*, 139 Fed 452 (C.C., E.D. Ky., 1905), reversed on other grounds, 201 US 1, 50 L ed 633, 26 S Ct 387 (1906); members of the Roman Catholic faith, *Juarez* v. *State*, 102 Tex. Cr. 297, 277 S. W. 1091 (Ct. of Crim. Appeals, Tex., 1925); and the same has been assumed in cases involving the exclusion of Mexicans,[7] Italians,[8] and wage-earning laborers.[9]

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[7] *Ramirez* v. *State*, 119 Tex. Crim. Rep. 362, 40 S. W. (2d) 138 (Ct. of Crim. App., Tex., 1931), cert. den., 284 US 659, 76 L ed 558, 52 S Ct 36 (1931); *Mirca* v. *Territory*, 13 N. M. 192, 81 P. 586 (Sup. Ct., N. M., 1905); *Carrasco* v. *State*, 130 Tex. Crim. Rep. 659, 95 S. W. (2d) 433 (Ct. of Crim. App., Tex., 1936), *contra*: *Sanchez* v. *State*, 181 S. W. (2d) 87 (Ct. of Crim. App., Tex., 1944), criticized in 23 Texas L. Rev. 78 (1944).

[8] *State* v. *Guirlando*, 152 La. 570, 93 So. 796 (Sup. Ct., La., 1922).

[9] *Mamaux* v. *U. S.*, 264 Fed 816 (C.C.A., 6th, 1920).

A.

There were completely and absolutely excluded from the panel from which petitioner's jury was chosen all laborers, operatives, service employees, and virtually all craftsmen, and foremen.

This exclusion was systematic, intentional, and deliberate. The officials of the Division of Jurors denied this, as such officials uniformly do in these cases. They claimed that persons were accepted or rejected for jury duty depending upon the "degree of intelligence as revealed by the questionnaire." In the very nature of things this cannot be the fact. It just cannot be that *not one* of the working people excluded, albeit of humble station in life, did not have sufficient intelligence "as revealed by the questionnaire" to qualify for special jury duty. Intelligence is by statute (*Judiciary Law*, § 596, Appendix B herein, pp. 10-11) a necessary qualification for a general juror, and there is no indication whatever that these people are excluded from general jury duty. Moreover there is certainly nothing in the questionnaire, or in the interview consisting only of a re-asking of the question on the questionnaire, to give any basis for a sifting of the superior intelligent from those who are just plain intelligent.

The total exclusion of these working people of humble station; the special attention which the Division of Jurors gives to the question of occupation, it being one of the few facts of which it makes official note on the questionnaire (R. 508A); the fact that prospective special jurors are questioned about their business experience; the circumstance that there are excluded all those less sophisticated persons who take seriously the mandatory direction to name preferred months of service—point irresistibly to the conclusion that the discrimination is intentional. As stated in *Lane* v. *Wilson*, 307 US 268, 275, 83 L ed 1281, 1287, 59 S Ct 872, 876 (1939): "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." As

stated in *Smith* v. *Texas*, 311 US 128, 132, 85 L ed 84, 87, 61 S Ct 164, 166 (1940): "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." It is impossible that "chance and accident alone" could have brought about the exclusion of laborers, operatives, service employees, craftsmen, and foremen. See *Smith* v. *Texas*, *supra*, at 311 US 131, 85 L ed 87, 61 S Ct 166.

B.

The large portion of women in New York County are effectively and intentionally excluded from jury service. While women are equally eligible with men to serve on juries in New York, the Division of Jurors summons only men to appear to be examined for jury duty. This discriminatory refusal to notify women of their right to serve on juries and to put in force on their behalf the machinery by which that right can be exercised, has the effect of excluding from jury service the bulk of the women in New York County qualified for such service.

This discrimination can be nothing but intentional. The officials in charge of the Division of Jurors gave as the reason for the practice the fact that women have a statutory exemption from jury service if they choose to exercise it. Even if the assigned reason were, contrary to established fact, the real reason, it would be no answer to the charge of intentional exclusion of women as such. The Division of Jurors must realize that many women would choose not to claim an exemption, and that the failure to summon these women excludes them from jury service. The officials of the Division of Jurors must intend the inevitable consequence of their failure to summon these women.

If the exclusion of women were not deliberate, it is not understandable why the Division of Jurors did not adopt the simple procedure of sending summonses to women as well as men, and inquiring, when the women came to be

examined pursuant to the summons, whether they would claim exemption from service. This is a manner in which the law contemplates that a woman shall exercise her right of exemption (*Judiciary Law*, § 600, Appendix B herein, p. 14), and the questionnaire has space specifically designated for the claiming of exemption (Defendant's Exhibit D-1, R. 508B).

An analogous situation was revealed in *Thiel* v. *Southern Pacific Co.*, 90 L ed Advance Opinions 922 (decided May 20, 1946), where this Court reversed a judgment on the ground of the exclusion from the jury of those working for a daily wage. The Court there stated, at pp. 925-926:

> "It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of $4 a day. All were systematically and automatically excluded."

The evidence shows, furthermore, that the intentional discrimination against women as such is intensified when the selection of special jurors is made. While some 7,000, or 11%, of the 60,000 general jurors are women, only 25 to 30 of the 3,000 special jurors, or 8/10ths of 1% to 1%, are women. It cannot be that no more than 25 or 30 women of the 7,000 women on the general jury panel did not have sufficient intelligence "as revealed by the questionnaire" to qualify for special jury duty. As stated, intelligence is a statutory requirement of general jurors (*Judiciary Law*, § 596, Appendix B herein, pp. 10-11).

C.

The deliberate solicitation of women jurors from the membership of "civic conscious" women's organizations, coupled with the failure to send summonses to women generally to appear to be examined for jury duty, is, of course, discrimination against women who are not members of "civic conscious" organizations.

No reason was given by the officials of the Division of Jurors for thus favoring members of "civic conscious" organizations other than the very fact of membership in such organizations. Accordingly it is clear that non-members of such organizations were discriminated against as such.

D.

There can be no doubt that petitioner, a labor union official, was aggrieved by the exclusion of laborers, operatives, service employees, craftsmen, and foremen, those groups which form the bulk of labor union membership and which alone include the kind of people with whom and for whom petitioner has worked.

As this Court stated in *Glasser* v. *United States,* 315 US 60, 85-86, 86 L ed 680, 707, 62 S Ct 457, 472 (1942), with reference to the selection of jurors in the Federal courts: "And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class." The absolute favoritism shown to bankers, manufacturers, stock brokers, and the like, in the selection of the special jury panel in New York County, has made that jury the organ of the social and economic class which these men represent. The trial of a labor union official before such a jury is a travesty of justice.

Nor can it be doubted that petitioner was aggrieved by the substantial exclusion of all women who were not members of "civic conscious" organizations. In *Glasser* v. *United States, supra,* the petitioner claimed that the women on the panel from which his jury was selected were taken from a list furnished by the Illinois League of Women Voters and prepared exclusively from its membership. This Court, holding that proof of this claim would require reversal of the judgment, stated (315 US 60, 86, 86 L ed 680, 707-708, 62 S Ct 457, 472):

> "The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

Whether petitioner, a male, has standing under the equal protection clause of the Fourteenth Amendment to complain of the intentional exclusion of women as such from the panel from which his jury was selected presents sharply a fundamental question concerning the application of the constitutional provision in matters of judicial procedure.

Petitioner is not a member of this excluded class, nor has he proved that he was actually prejudiced by the exclusion of women as such. However, petitioner submits that this is immaterial, and that the proof that he was found guilty by a jury selected from a panel from which women were intentionally excluded requires reversal of the judgment against him on the basis of the equal protection clause of the Fourteenth Amendment.

This Court has many times reversed convictions of Negroes tried by juries from which Negroes were deliberately excluded. This Court held in these cases that the equal protection clause of the Fourteenth Amendment entitled these defendants to the chance, unaffected by any element of deliberate discrimination, of having Negroes on the jury which tries them. The basis of these decisions was certainly not any proof that juries of which Negroes had a chance of becoming members would have decided the case differently than did the jury whose verdict was before the Court. Rather, the basis of these decisions, as stated in *Smith* v. *Texas*, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164, 165, is that "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community", and that for "discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government". In other words, what is crucial is that there shall have been such discrimination as tends to make the jury a body not truly representative of the community. The principle is not that the jury should represent the defendant, but rather the community; and a jury from which women are intentionally excluded does not represent the community.

Where as a matter of substantive law state action arbitrarily discriminates against one class or group of persons it is obviously necessary that one who would complain that he has been denied the equal protection of the laws thereby must show that he is a member of the class or group discriminated against. Otherwise, it is self-evident and demonstrable that he has sustained no personal injury. But it is otherwise where the composition of the jury panel is involved. No one can prove by legal evidence how the inclusion on the panel of classes or groups actually excluded would have affected the result of the trial. To require one convicted by a jury from which

substantial segments of the community were excluded to prove that he was a member of the class excluded or actually prejudiced thereby would open the door to the most insidious discriminations, indirect but no less real.

As this Court recently stated in *Ballard* v. *United States*, CCH U. S. Sup. Ct. Bulletin, Vol. 7, pp. 205, 210, in dismissing an indictment against a woman and her son, returned by a grand jury and tried by a trial jury from which women were intentionally excluded:

> "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

As the Court stated in *United States* v. *Roemig*, 52 F. Supp. 857, 862 (D. C., N. D. Iowa, 1943), in rejecting the conclusion that a man could not complain of the exclusion of women from the jury:

> "Such a conclusion must rest upon the premise that in the administration of criminal justice each sex may logically be expected to deal more charitably and tolerantly with its own members than with those of the opposite sex. The presumption urged is not inevitable; indeed, it may be argued upon many concrete precedents, some ancient, others very modern, to be quite unfounded. Here again, instead of resting upon an hypothesis that is historically and psychologically dubious, one would seem to be on firmer ground who inquires simply whether the defendant has been indicted by a grand jury selected as he had the right under the law to expect and require it to be selected. That inquiry answered negatively, the indictment ought to fail, without requiring the doubtfully possible proof of concrete injury to the moving defendant."

The cases involving claims of denial of procedural due process provide an apt analogy. In such cases this Court has time and time again rejected the contention that the claimant must show actual prejudice. *Tumey* v. *Ohio*, 273 US 510, 535, 71 L ed 749, 759, 47 S Ct 437, 435 (1926); *Patton* v. *United States*, 281 US 276, 292, 74 L ed 854, 860, 50 S Ct 253, 256 (1930); *Glasser* v. *United States*, 315 US 60, 75-76, 86 L ed 680, 702, 62 S Ct 457, 467 (1942); *Lyons* v. *Oklahoma*, 322 US 596, 597, 88 L ed 1481, 1483, 64 S Ct 1208, 1210 (1944); *Malinski* v. *New York*, 324 US 401, 404, 89 L ed 1029, 1032, 65 S Ct 781, 783 (1945).

SECOND POINT

Section 749-aa of the Judiciary Law of the State of New York is unconstitutional and void as applied to petitioner in that it deprived petitioner of the equal protection of the laws in contravention of the Fourteenth Amendment of the Federal Constitution. By being tried by the special jury pursuant to the provisions of this statute, petitioner was, without justification, and to his prejudice, treated differently than other defendants in criminal cases who are tried by a general or ordinary jury.

In being forced to go to trial before the special jury by virtue of the provisions of Section 749-aa of the *Judiciary Law*, petitioner was treated differently than other defendants in criminal cases in the New York courts who are tried by a general jury. If, as petitioner asserts, there was no rational basis for his being tried before the special jury as distinguished from a general jury, then it is clear that petitioner was denied the equal protection of the laws and that the statute referred to (*Judiciary Law*, § 749-aa) is unconstitutional and void as applied to him.

The special jury panel differs radically from the general jury panel in New York County. While the defect of discrimination against women, particularly those who are not

members of so-called "civic conscious" organizations, permeates both the general and special juries, there is no evidence whatever that laborers, operatives, service employees, craftsmen, and foremen, are excluded from the general jury panel. To the contrary, the evidence indicates that men are summoned to be examined for jury duty without regard to occupational, social, or economic status, and that anyone thus summoned who evidences the qualifications required by law is admitted to general jury duty. The evidence shows that the exclusion of laborers, operatives, service employees, craftsmen, and foremen, occurs as a result of the exercise of the uncontrolled discretion vested in the officials of the Division of Jurors to select, from those qualified for general jury duty, persons to serve on the special jury panel.

Moreover, the evidence shows that while women are discriminated against in the empanelling of the general jury, that discrimination is intensified in selecting the special jurors. While 11% of the general jurors are women, only 1%, at most, of the special jurors are women.

There is a further and distinct respect in which the special jury differs vitally from the general jury. *It is a matter of official record that special juries in the State of New York are much more prone to convict defendants in criminal cases than are general juries.* The Judicial Council of the State of New York has so found.

A word first about the Judicial Council. This public body was established by statute in 1934 to make continuous study and survey of all matters relating to judicial organization and procedure, and to make reports and recommendations to the Legislature, and to the courts, of such changes therein which would improve the administration of justice (*Judiciary Law*, §§ 40-48).

The membership of the Judicial Council consists, by law, of the chief judge of the Court of Appeals, the presiding justices of each Appellate Division of the Supreme Court, the members of the Legislature serving as chairmen or ranking minority members of various specified legislative

committees having to do with judicial organization and procedure, a member of the bar from each judicial department in the State, and two citizens of the State at large (*Judiciary Law*, § 40).

In its *Fourth Annual Report* (Legislative Document No. 48, 1938), the Judicial Council stated (pp. 46-47):

> "A more serious charge than its uselessness has been levelled at the special jury. It has been suggested that, by a process of eliminating jurors who have previously served on a special jury which has ended in acquittal or disagreement, special juries are particularly chosen to be convicting juries. Data gathered by the Judicial Council on the use of special juries during the five-year period July 1, 1932 to June 30, 1937, in the counties of New York, Bronx, Kings and Queens, indicate that special juries are prone to convict. During the period studied, of 383 defendants tried before special juries, 78 per cent were convicted and 22 per cent were acquitted. It should be noted that in the 383 cases, only five defendants demanded a special jury. In all other cases, the application was made by the people.
>
> To compare the special with the ordinary juries, a study was made of all homicide cases, except those involving negligence or automobiles, tried during 1933 and 1934. The percentage of convictions to acquittals was much higher in cases tried by special juries than in cases tried by ordinary juries. During the calendar year 1933, of the 47 defendants tried for homicide before special juries 83 percent were convicted and 17 percent were acquitted. During the same period, of 156 defendants tried for offenses of the same grade by ordinary juries, 43 percent were convicted and 57 percent were acquitted. In 1934, of 72 defendants tried before special juries, 82 percent were convicted and 18 percent were acquitted, while of 191 defendants tried by ordinary juries, 37 percent were convicted and 63 percent were acquitted (see Table II below).
>
> It is significant also that the percentage of defendants pleading guilty to a lesser offense was much higher in cases to be tried before special juries than those to be tried by ordinary juries. In 1933, for

example, 26 percent of 47 defendants to be tried before special juries and only 9 percent of the 156 defendants to be tried before ordinary juries pleaded guilty to a lesser offense. In 1934, 39 percent of 72 defendants and 2 percent of 191 defendants to be tried before special and ordinary juries respectively, pleaded guilty to lesser offenses. Thus, defendants to be tried before special juries seem to realize that their chances of complete acquittal are much less than if they were to be tried before ordinary juries." [10]

There can be no doubt then that petitioner was gravely prejudiced in being tried by a special jury as distinguished from a general jury: in the first place, because the general jury is more truly representative of the community than is the special jury; in the second place, because the special jury is much more prone to convict defendants in criminal cases than is the general jury. Actually, however, the question of prejudice is immaterial since it is clear that this Court will not impose on petitioner the burden of showing actual prejudice where there has been a departure from the constitutional norm (equal treatment of those similarly situated) in a matter of trial procedure (see cases cited *supra*, p. 26, relating to prejudice in denial of procedural due process).

The only remaining question is whether there is any justification for empanelling special juries as distinguished from general juries in the State of New York.

It is absolutely clear and certain that there is not. Section 749-aa of the *Judiciary Law* sets forth no standard for the selection of special jurors which is not, as shown by the evidence, applicable in the selection of general jurors; and apart from the insidious practice of eliminating from special jury duty all those who follow the mandatory direction to name preferred months of service, the *stand-*

[10] There follows in the *Report* (pp. 47-48) tables of data from which the above information was taken. These tables are set forth in this brief in Appendix D, page 45. We have printed as Appendix D to this brief all the material in the official reports of the Judicial Council dealing with the special jury.

ard which the officials of the Division of Jurors stated they used to select special jurors is, by law, also a standard governing the selection of general jurors. Time and time again these officials testified that intelligence was the requisite qualification for special jury duty (R. 44-45, 46, 49, 51, 75, 80-81). But one must also be intelligent to qualify as a general juror (*Judiciary Law*, § 596, Appendix B herein, pp. 10-11).

In its *Third* (1937), *Fourth* (1938), *Fifth* (1939), and *Sixth* (1940) *Annual Reports* (see Appendix D herein, pp. 36-47), the Judicial Council not only condemned the special juries in New York as un-American, but pointed out that they were unnecessary since the qualifications prescribed by law were substantially the same for both the general and special juror.

In 1940, the method of general jury selection in New York City was changed by statute in accordance with the recommendations of the Judicial Council. After this change, the Judicial Council stated even more forcefully its previous finding that special juries were unnecessary. In its *Eighth Annual Report* (Legislative Document No. 48, 1942, pp. 39-41), the Judicial Council stated:

> "Since 1937 the Judicial Council has been recommending the abolition of special juries as undesirable and un-American. (Third Report, pp. 34, 121-128; Fourth Report, pp. 46-48; Fifth Report, p. 42). In 1941 the Legislature by Chapter 402, abolished special juries in the counties of Westchester—population 569,122—and Nassau—population 404,888—(see *supra*, page 24). Thus, special juries at present exist only in the counties of New York, Bronx, Kings and Queens. In its Fourth Annual Report the Council stated (page 47):
>
> > 'The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases.'

The goal of a higher calibre of jurors *has now been achieved* under the new method of jury selection for the city of New York which went into effect September 1, 1940 upon recommendation of the Judicial Council and which now applies to *all* jurors those high standards which formerly were required only of special jurors.

The Judicial Council therefore again renews its recommendation for the abolition of special juries because:

a. The need in certain cases for better jurors was in the past the only valid objection to the abolition of special jurors. This objection, as stated above, has now been entirely overcome.

b. The undesirable features of a special jury are still present.

Some opponents of the Council's recommendation have now conceded that the Council's position is well taken. The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York in its 1940 Reports, Memo No. 65, page 169, withdrew its former opposition and stated:

'In a previous report . . . this committee disapproved a bill (S.P. 180, . . . ; A. Pr. 210, Int. . . .) seeking to abolish the blue ribbon jury. The basis of this action was that the reform of the methods of selecting jurors is a prerequisite to the elimination of the blue ribbon system. The enactment of the bill under consideration [putting into effect the new jury system] would satisfy this condition and would eliminate the chief basis of the committee's action with regard to S. Pr. 180, A. Pr. 210. In such event, the committee would approve S. Pr. 180, A. Pr. 210.'

Similarly, some of the officials most directly concerned had conceded that objection to the abolition of special juries would be met if all jurors were selected according to the provisions of the Judiciary Law with attention to the qualifications and disqualifications as therein set forth.

Not only is this now the case but the requirements for an acceptable juror have been made much more

stringent than heretofore. Each prospective juror is searchingly examined and his qualifications carefully checked. The new system of jury selection is based on the best businesslike and up-to-date administrative methods.

The Judicial Council has been advised by the four county clerks of the counties concerned that all jurors now serving and available for service have been qualified and examined under the new system. The Council has further been informed by the county clerks, as well as by others in a position to know, that the calibre of general jurors has greatly improved since the establishment of the new system.

Special juries are now practically confined to the trial of murder charges. From July 1, 1932 to June 30, 1941 every application for a special jury was made by the people.

It has been said that the abolition of special juries will result in too great a loss of time at the trial of actions where the crime charged is punishable by death, by reason of the possible drawing of jurors opposed to capital punishment. This matter, however, has been taken into account under the revised jury system in section 597 of the Judiciary Law which reads as follows:

> '§ 597. Juror with scruples against death penalty. No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of murder in the first degree. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.' (Added L. 1940, ch. 202, effective Sept. 1, 1940.)

This section applies to all trial and grand jurors throughout New York City and was included specifically to save time in the examination of jurors by attorneys. It has proven successful in Richmond County, which has no special jurors."

The trial of petitioner by a special jury as distinguished from a general jury denied him the equal protection of the laws in violation of the Fourteenth Amendment.

THIRD POINT

The trial of petitioner by a jury selected from a panel from which laborers, operatives, craftsmen, foremen, service employees, and also women, particularly those not members of so-called "civic conscious" organizations, were systematically, intentionally and deliberately excluded, deprived petitioner of due process of law in contravention of the Fourteenth Amendment.

In *Hebert* v. *Louisiana*, 272 US 312, 316, 71 L ed 270, 273, 47 S Ct 103, 104 (1926); this Court stated:

> "What it [the due process of law clause in the Fourteenth Amendment] does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

This statement of the requirements of due process has often been adopted by this Court in cases involving procedural due process. *Powell* v. *Alabama*, 287 US 45, 67, 77 L ed 158, 169, 53 S Ct 55, 63 (1932); *Mooney* v. *Holohan*, 294 US 103, 112, 79 L ed 791, 794, 55 S Ct 340, 342 (1935); *Brown* v. *Mississippi*, 297 US 278, 286, 80 L ed 682, 687, 56 S Ct 461, 465 (1936); *Palko* v. *Connecticut*, 302 US 319, 328, 82 L ed 288, 293, 58 S Ct 149, 153 (1937).

Petitioner submits that his trial and conviction for a serious criminal offense by a jury selected from a panel from which were intentionally excluded as such, laborers, operatives, service employees, craftsmen, and foremen, and women, particularly those not members of so-called "civic conscious" organizations, was inconsistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Petitioner is aware that the State of New York is free to regulate the procedure of its courts in accordance with its own conceptions of policy, and that in doing so it may abolish trial by jury. *Walker* v. *Sauvinet*, 92 US 90, 23 L ed 678 (1875); *Maxwell* v. *Dow*, 176 US 581, 44 L ed 597, 20 S Ct 448 (1900); *Hurtado* v. *California*, 110 US 516, 28 L ed 232, 4 S Ct 111, 292 (1884).

However, as stated in *Brown* v. *Mississippi*, 297 US 278, 285, 80 L ed 682, 687, 56 S Ct 461, 465 (1936):

> "But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal."

There are in this country two traditional methods of trial, one, by a judge or judges, whatever may be their official title, the other, by a judge and a jury. It is settled that where one is tried by a judge, he is entitled as a matter of due process of law to a basically impartial judge. *Tumey* v. *Ohio*, 273 US 510, 71 L ed 749, 47 S Ct 437, 50 A.L.R. 1243 (1926). It is petitioner's assertion that where one is tried by a judge and a jury, he is entitled as a matter of due process of law to a jury which is basically impartial, to a jury from which substantial segments of the community, otherwise able to meet relevant and permissible qualifications established by law, have not been intentionally excluded.

The decisions of this Court have recognized that a jury "truly representative of the community" is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

In *Smith* v. *Texas*, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164, 165 (1940), a case involving discrimination against Negroes in the selection of a grand jury, it was stated:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be

a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

In *Glasser* v. *United States*, 315 US 60, 86, 86 L ed 680, 707-708, 62 S Ct 457, 472 (1942), a case involving the alleged exclusion from jury service of women who were not members of the League of Women Voters, this Court stated, with reference to the duty of selecting federal jurors:

> "And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.
>
> The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition,

it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

In *Thiel* v. *Southern Pacific Co.*, 90 L ed Advance Opinions 922, 924-925 (decided May 20, 1946), reversing a civil judgment based on a verdict rendered by a jury from which persons working for a daily wage were excluded, this Court stated:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Smith v. Texas, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164; Glasser v. United States, 315 US 60, 85, 86 L ed 680, 707, 62 S Ct 457. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideal of trial by jury."

* * * * * * *

"Moreover, the general principles underlying proper jury selection clearly outlaw the exclusion practiced in this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay-period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very sub-

> stantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do."

In *Ballard* v. *United States,* CCH US Sup. Ct. Bulletin, Vol. 7, page 205 (decided December 9, 1946), this Court dismissed an indictment returned by a grand jury and tried by a trial jury from which women were intentionally excluded. The Court reiterated the principle that it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community, and stated:

> "The exclusion of one [sex] may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

Thus, this Court has not only recognized that "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community" (*Smith* v. *Texas, supra*), but has condemned the very type of exclusions involved in the present case.

The basic unfairness of the special or "blue ribbon" jury system in New York County has long been recognized.

We have referred to the official reports of the Judicial Council of the State of New York to the extent that they reported that special juries were useless and biased in favor of the prosecution.

But the Judicial Council's condemnation of the special jury is based on grounds in addition to these.[11]

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[11] So much of the Reports of the Judicial Council as deals with special juries is set forth in this brief as Appendix D, pp. 36-53

In its *Third Annual Report* (Legislative Document No. 48, 1937), the Judicial Council stated (p. 123, Appendix D herein, p. 36):

> "The Judicial Council recommends legislation abolishing struck juries, foreign juries and special juries. A well-considered jury system will insure an impartial cross-section of the community on every petit jury."

In its *Fourth Annual Report* (Legislative Document No. 48, 1938), the Judicial Council stated (p. 47, Appendix D herein, p. 44) that it was "unjust" "to select supposedly special juries in specific cases."

In its *Fifth Annual Report* (Legislative Document No. 48, 1939), the Judicial Council, referring to the fact that the legal requisites prescribed for the special jurors were then substantially the same as those prescribed for general jury duty, stated (p. 42, Appendix D herein, p. 46):

> "In consequence, as might have been expected, such a special juror inevitably feels superior and such a special jury system becomes distinctly un-American and not consonant with a trial by one's peers."

In subsequent Reports the Judicial Council continues to condemn the special jury as "un-American," and in its current Report (*Twelfth Annual Report*, Legislative Document No. 17, 1946) the abolition of the special jury is placed as Number 1 of its renewed recommendations (p. 53, Appendix D herein, p. 53).

The Judicial Council is not alone in its condemnation of the special jury system. In his message to the New York Legislature on January 14, 1941, former Governor Lehman recommended the abolition of "blue ribbon" juries, declaring them to be "at war with our basic concepts of a democratic society." He stated:[12]

> "I recommend that blue ribbon juries be abolished. These special juries are used only in the Counties of New York, Bronx, Kings, Queens and Westchester.

[12] *New York Times*, January 15, 1941, p. 16.

This in itself is untenable. There is no reason why special juries should be used in one part of the State and not in another—if the practice is sound.

However, I do not believe the practice is sound. The use of special or so-called blue ribbon juries is not consonant with the preservation of the constitutional right to a trial by a jury of peers. It is at war with our basic concepts of a democratic society.

It is well known that blue ribbon juries are chosen to be convicting juries. This is demonstrated by a special study made by the Judicial Council. This study clearly establishes that the percentage of convictions to acquittals is much higher in cases tried by special juries than in cases tried by ordinary juries. While blue ribbon jurors are taken from the ordinary jury list, unlike other jurors, they are given a personal interview by the Commissioner of Jurors. Thus, by a process of eliminating jurors who have previously served on blue ribbon juries which have ended in acquittal or disagreement, special juries are particularly selected to be convicting juries. To say the least, such a practice is inexcusable. That it exists is borne out by the facts.

It has been urged by prosecuting officials of the five counties affected that our ordinary juries are not of sufficiently high caliber. If that was ever true, it is not true today. Recently we have removed most jury exemptions and empowered women to serve on all juries. Many new administrative improvements have been adopted, particularly in New York County, and these same improvements are now being adopted in all other counties in New York City. Today it is more than ever unjust and unnecessary to select special juries in specific cases. Blue ribbon juries should be abolished."

Petitioner does not contend that due process of law is satisfied only if a panel from which a jury is selected contains representatives of all economic, social, religious, racial, political, and geographical groups in the community.

What petitioner does claim is that "the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an

impartial jury drawn from a cross-section of the community" (*Thiel* v. *Southern Pacific Co.*, 90 L ed Advance Opinions 922, 924), and that the deliberate and intentional exclusion of segments of the community from the jury panel can reach a point where the trial of a person before a jury chosen from such a panel denies to him due process of law under the Fourteenth Amendment.

Petitioner does not believe that the Court is called upon here to determine whether the intentional exclusion of any one of the particular groups excluded in the present case would constitute a denial of due process of law under the Fourteenth Amendment. Inquiry as to whether due process has been satisfied in trial procedure is particularly directed to the circumstances of the case at hand. *Snyder* v. *Massachusetts*, 291 US 97, 116, 78 L ed 674, 684, 54 S Ct 330, 336 (1934).

It is petitioner's claim that the intentional exclusion from the jury panel of laborers, operatives, service employees, craftsmen, foremen, and women, particularly those not members of so-called "civic conscious" organizations, amounted to such a flagrant disregard of the American tradition of trial by jury, which necessarily contemplates an impartial jury drawn from a cross-section of the community, as to constitute a denial of due process of law under the Fourteenth Amendment.

If, as petitioner asserts, there was this fundamental unfairness in the manner of his conviction of a crime, the question of actual prejudice is immaterial. *Tumey* v. *Ohio*, 273 US 510, 535, 71 L ed 749, 759, 47 S Ct 437, 445 (1926); *Patton* v. *United States*, 281 US 276, 292, 74 L ed 854, 860, 50 S Ct 253, 256 (1930); *Glasser* v. *United States*, 315 US 60, 75-76, 86 L ed 680, 702, 62 S Ct 457, 467 (1942); *Lyons* v. *Oklahoma*, 322 US 596, 597, 88 L ed 1481, 1483, 64 S Ct 1208, 1210 (1944); *Malinski* v. *New York*, 324 US 401, 404, 89 L ed 1029, 1032, 65 S Ct 781, 783 (1945).

FOURTH POINT

Section 749-aa of the Judiciary Law of the State of New York is unconstitutional and void as applied to petitioner in that it denied petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution. This statute sets forth no standard to guide those charged with the selection of special jurors and therefore enables these officials to act arbitrarily, unreasonably, and capriciously in selecting special jurors. Furthermore, these officials in fact acted arbitrarily, unreasonably, and capriciously in selecting the special jury panel from which petitioner's jury was drawn.

Section 749-aa of the *Judiciary Law* of the State of New York, the law authorizing the empanelling of special juries, furnishes no rule or standard to guide or govern the County Clerk in the selection of special jurors. Accordingly, it enables the County Clerk and his deputies to act arbitrarily, unreasonably, and capriciously in selecting special jurors. Such a statute denies petitioner the due process of law guaranteed to him by the Fourteenth Amendment of the Federal Constitution. See *Yick Wo* v. *Hopkins*, 118 US 356, 30 L ed 220, 6 S Ct 1064.

However, the Court is not obliged to pass on the validity of the statute tested only by the opportunities for the denial of due process which its terms afford. The evidence in this case shows that the officials of the Division of Jurors in fact acted arbitrarily, unreasonably, and capriciously in selecting the members of the special jury panel from which petitioner's jury was drawn. This evidence establishes conclusively that these officials without any justification whatever rejected for special jury duty laborers, operatives, service employees, craftsmen, foremen, and women, particularly those who were not members of "civic conscious" organizations.

Petitioner was accordingly denied the due process of law guaranteed to him by the Fourteenth Amendment. *Fiske* v. *Kansas*, 274 US 380, 71 L ed 1108, 47 S Ct 655 (1927); *Nectow* v. *Cambridge*, 277 US 183, 72 L ed 842, 48 S Ct 447 (1928); see *Yick Wo* v. *Hopkins*, 118 US 356, 30 L ed 220, 6 S Ct 1064 (1886).

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

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APPENDIX A

Section 749-aa of the *Judiciary Law* of the State of New York

§ 749-aa. Special jurors in certain counties.

1. List of special jurors. The county clerk of each county of the state having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be entered in suitable books alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose

opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy or secretary as to his qualification and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before him, his deputy or secretary at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. All of the provisions of sections four hundred four through four hundred fourteen of the civil practice act, sections twenty-five and twenty-six of the civil rights law, are made applicable to the enforcement of the provisions of this subsection, except that no fees are required to be paid to any person so subpoenaed. The county clerk, in the record made by him of the jurors selected as such special jurors, shall enter the age of each special juror so selected, his business or vocation, if any,

the length of his residence in the state and county and, if naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection.

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk as provided in section six hundred and two of this chapter. A minute of the drawing must be kept by the county clerk, or his deputy, which must be entitled in the action in which the jury is to serve specifying the term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named in the manner provided for trial jurors, except that provisions as to intervals of time with regard to the notification of trial jurors shall not apply. Before the day specified for the attendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6. Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury is completed, or if the trial court shall be of the opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors.

either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept and certified as prescribed for the original drawing, and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore compiled, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

9. Appellate division to make rules. The justices of the appellate division of the supreme court of the department embracing the county in which such special jury list shall be constituted shall make such rules and regulations not inconsistent with the provisions of this section as shall be necessary to regulate the making of the application for a special jury under the provisions of this section for the

drawing and attendance of such jurors and for the proper and efficient enforcement of the provisions of this section.

10. Violations of section or rules, penalty. Any violation of this section, or of such rules and regulations prescribed by the appellate division of the supreme court shall be deemed a contempt of court under section seven hundred fifty of the judiciary law and such rules and regulations may be enforced as if a violation thereof were such a contempt as provided by section seven hundred fifty-one of the judiciary law.

APPENDIX B

Further Provisions of the Judiciary Law of the State of New York Relating to Jurors in New York County

§ 590. County clerk to select, draw, summon and empanel jurors.

The county clerks of the counties included within a city having a population of one million or more shall select, draw, summon and empanel all jurors for all courts within their respective counties and shall decide upon their qualifications and exemptions, in the manner prescribed by this article, article eighteen-B of the judiciary law, those sections of the code of criminal procedure regarding grand jurors, or the rules adopted pursuant thereto. But this section shall not operate to impair the right to challenge a particular juror at a trial.

§ 591. County jury board.

There shall be established for each county of a city having a population of one million or more a "county jury board" which shall consist of the presiding justice of the appellate division of the supreme court for the department embracing the county, or his designee from among the justices of the court, a justice of the supreme court residing in the county to be designated by the justices of the appellate division for the department embracing the county, one judge of the court of general sessions or of the county court residing in the county, to be designated by the justices of the appellate division of the department embracing the county, and the county clerk of the county. Such designations, except of the county clerk, shall be made in writing, filed in the office of the county clerk, and shall continue in effect until changed.

In the counties of New York and Bronx, the mayor of the city of New York shall also be a member of the county jury board.

The county jury board shall exercise the powers and duties in regard to the selection of grand jurors as prescribed by section two hundred and sixty-seven-aa of the code of criminal procedure.

The county clerk shall also consult with the county jury board in regard to the proper and efficient administration of the jury system.

§ 592. Appellate divisions to make rules.

The justices of the appellate divisions of the supreme court in the first and second judicial departments, or a majority of such justices, acting jointly, shall adopt and may from time to time amend and rescind rules not inconsistent with statute, to regulate the time, manner and practice of examining, selecting, drawing, summoning and empaneling jurors, and the number of each to be selected, drawn and empaneled in and for the several courts within the counties of a city having a population of one million or more, and in addition to regulate in any other respects the duties enjoined by law on the county clerks and on the county jury boards in such counties with respect to the administration of the jury system.

§ 593. Specific power and duties of county clerk.

The county clerk shall be an officer of all courts of record located in the county in which he acts and shall have authority to administer oaths or affirmations in relation to any matter relating to his duties under this article, article eighteen-B of the judiciary law, those sections of the code of criminal procedure regarding grand jurors or the rules adopted pursuant thereto.

He shall keep a record of all proceedings before him, or in his office.

He must furnish a copy of each paper filed or proceedings taken in his office, to any person applying therefor and paying the fees, except that answers, data and information obtained in interviewing and examining prospective jurors shall be considered confidential and shall not be disclosed

except as permitted by the appellate divisions. The county clerk shall charge the same fees for furnishing copies of papers as the clerk of a court of record, and shall pay over all such fees to the treasurer of the city of New York.

The county clerk may designate from among the members of his staff, by a certificate filed in his office, any deputy or assistant to perform any of his duties with respect to jurors as required by law.

Whenever reference is made to the county clerk in this article, article eighteen-B of the judiciary law, those sections of the code of criminal procedure regarding grand jurors or the rules adopted pursuant thereto, such reference shall be deemed to apply also to deputies or assistants duly designated by him, except where the contrary intent is plainly apparent from the context.

In accordance with the law and pursuant to the rules of the justices of the appellate division, each county clerk shall:

(1) make personal examination of individuals concerning their eligibility or the eligibility of others for jury service, and for that purpose to issue and enforce notices, mandates and subpoenas,

(2) hear and determine claims for exemption from jury service within the county,

(3) prepare ballots for qualified jurors,

(4) draw panels of jurors for regular and adjourned terms of court,

(5) notify and summon jurors drawn for service,

(6) take any steps necessary to bring about the punishment of those who violate the laws and rules relating to the drawing, selection, summoning and empaneling of jurors,

(7) consult with the county jury board as provided in section five hundred and ninety-one of this article, and

(8) do all things necessary and proper for the true execution of his powers and duties.

§ 594. Source of names.

The county clerk, in order to ascertain names of persons eligible as jurors, may consult the latest census enumeration, the latest published telephone or city directory, the records of the department of taxes and assessments, the voters' registry list and any other available sources.

Each public officer of a city having a population of one million or more shall upon request at all times furnish to the county clerk of the county in which such public officer acts, without charge, all information within his control to enable such county clerk to procure the names of persons eligible to serve as jurors, as well as information concerning a person's qualifications or lack of qualifications for jury service.

§ 595. Examination as to fitness; personal interviews; police records.

No person's name shall be entered on a jury list unless (a) he has been personally interviewed by the county clerk, (b) he has stated his qualifications under oath, (c) his name has been forwarded to the police department for checking against the records of that department and a report received or a reasonable time has elapsed without such a report, and (d) the county clerk, in the case of grand jurors, shall also have received a certificate of the central bureau of criminal identification, records and statistics from the state commissioner of correction in accordance with the provisions of section two hundred and sixty-seven-a of the code of criminal procedure.

§ 596. Qualifications of jurors.

In order to be qualified to serve as a juror in the counties included within a city having a population of one million

or more, a person must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June Thirtieth next thereafter, is a resident of that county, within the meaning of this section.

§ 597. Juror with scruples against death penalty.

No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.

§ 598. Disqualifications.

Each of the following officers is disqualified to serve as a juror:

1. All elected members of the federal and state executive departments and of the executive department of any political subdivision of the state.

2. The comptroller; the attorney-general; the head of a department or the head and members of a board, council or commission which is the head of a civil department of the federal or state government, or of any political subdivision of the state; members of the state tax commission; members of the state commission of correction; members of the state industrial board; members of the public service and transit commissions; the commissioner of education; the commissioner of agriculture and markets; the commissioner of social welfare and the deputy of each officer specified in this subdivision; the secretary to the governor.

3. A member of congress or of the legislature, or a member of the city council of the city of New York.

4. A judge of a court of record, or a surrogate.

5. A sheriff, under sheriff, or deputy sheriff, regularly engaged in the performance of his duties.

6. The clerk or deputy clerk of any court.

No public officer or employee of the United States government, or of any state, city or municipality, or of any political subdivision of any of them, or of any official board, authority, council, commission, corporation, or other agency of any of them, shall serve on any grand jury. This prohibition shall not apply, however, to any public officer serving without compensation, or for compensation of not to exceed one dollar a year, on any local, appeal or advisory board established under the selective service system of the United States pursuant to the provisions of the "Selective Training and Service Act of 1940," or any amendments

thereof, nor shall it apply to those who are public officers or employees of the state solely by virtue of their membership in the New York guard pursuant to article two-A of the military law. For the duration of the war and for the period to which the annual grand jury list in effect at its termination shall be applicable this prohibition shall not apply to any public officer or employee mentioned in the first sentence of this paragraph who serves as such public officer or employee without compensation or for compensation not in excess of one hundred dollars per year.

§ 599. Exemptions.

Each of the following persons only, any inconsistent provision of law to the contrary notwithstanding, although qualified, is entitled to exemption from service as a juror upon claiming exemption therefrom: 1. A clergyman or minister of religion officiating as such and not following any other calling.

2. A practicing physician, surgeon, or dentist having patients requiring his daily professional attention, a licensed pharmacist actually engaged in his profession as a means of livelihood, a duly licensed embalmer actually engaged in his profession as a means of livelihood, and an optometrist actually engaged in the practice of optometry.

3. An attorney or counsellor at law regularly engaged in the practice of law as a means of livelihood.

4. A person belonging to the army, navy or marine corps of the United States, and the active national guard and naval militia of the state.

5. A member of a fire company or department or police force or department duly organized according to the laws of the state or any political subdivision thereof and performing his duties therein; or an exempt volunteer fireman, as defined in section two hundred of the general municipal law.

6. A captain, engineer, or other officer, actually employed upon a vessel making regular trips; or a licensed pilot actually following that calling.

7. A woman.

8. An editor, editorial writer, a sub-editor, reporter or copy reader, actively and regularly employed in the handling or gathering of news for a daily, semi-weekly or weekly newspaper.

§ 600. Evidence of exemption.

The evidence of the right to exemption as prescribed in section five hundred and ninety-nine is as follows:

An affidavit of the applicant or of another person in his behalf satisfactory to the county clerk stating the facts entitling the applicant to exemption, or in the case of an exempt volunteer fireman, the certificate provided for in section two hundred and two of the general municipal law.

Each affidavit must be filed with the county clerk and must be kept open by him at all reasonable times to public inspection.

The right to exemption must be claimed at the time of examination for liability to serve as a juror, except that a woman may claim such right to exemption at any subsequent time. If a male fails to present such claim at such time, he shall be deemed to have waived the same and cannot be exempted thereafter except for reasons accruing after the time of examination. If, however, he claims exemption at the time of his examination and is not granted the same, he may present such claim for exemption to the court when drawn for jury service or may review such refusal in the manner provided by article seventy-eight of the civil practice act.

§ 601. Length of service of jurors and limitation on recurrence thereof.

The length of service of grand or trial jurors in any county included within a city having a population of one million or more shall be determined by rules adopted pursuant to this article.

A person who has served his term as a trial juror in any court within the state, including a federal court, unless he is engaged in the trial of an action or proceeding when his term expires, shall not be qualified to serve again as a trial juror in any court within any county included within a city having a population of one million or more for two years subsequent to the last day of his service.

A person who has served his term as a grand juror in any court, including a federal court, within any county included within a city having a population of one million or more, shall not be qualified to serve again as a grand juror or as a trial juror in any court within such county for one year subsequent to the last day of his service.

Nothing contained in this section shall invalidate a verdict returned by a trial jury or an indictment returned by a grand jury, even though such trial or grand jury includes one or more trial or grand jurors respectively not qualified by virtue of such previous service.

§ 602. Officers to attend drawing.

On a day designated by the county clerk, at least one judge of a court of record residing or sitting in the county, to be designated by the justices of the appellate division of the supreme court of the department embracing the respective counties, must supervise the proper drawing of jurors for terms of courts of record where issues are triable by a jury.

603. County clerk to notify jurors.

The county clerk must notify each juror drawn for jury service by serving upon him a notice to that effect and speci-

fying the place where and the time when he is required to attend. The notice may be served by mail, personally, or by leaving it at the juror's residence or place of business with a person of suitable age and discretion.

§ 604. Excuses and postponements.

The judge of the trial court may, in his discretion, on the application of a trial juror, excuse him from a part or the whole of the time of service required of him as a juror or may postpone the time of service of a juror to a later day during the same or any subsequent term of the court.

A person who has been notified to attend and who applies to be excused as prescribed in this section must present the notice to the judge in open court. If he cannot personally attend he must send it by a person capable of making the necessary proof in relation to his claim to be excused.

A note of the excuse and of the reason therefor, attested by the judge, who must append his signature or initials thereto, must be made or endorsed upon the notice to attend; or, if the person notified has not brought it into court, upon a separate piece of paper which must be transmitted to the county clerk as part of the report specified by rule.

§ 605. Discharge by the court.

The court must discharge a person from serving as a trial juror in the following cases, where the causes justifying the discharge have arisen after examination for liability or where the person has claimed exemption at the time of examination and was refused: 1. Where it satisfactorily appears that he is not qualified:

2. Where it satisfactorily appears that he is disqualified:

3. Where it satisfactorily appears that he is exempt and he claims the benefit of the exemption.

Where a person is discharged for any of the causes specified in this section, the county clerk must destroy the ballot containing his name.

§ 606. Penalties.

A person who, in the manner set forth in article one hundred and sixteen of the penal law, shall hinder or obstruct the proper administration, or violate any of the provisions of this article, of article eighteen-B of the judiciary law, of those sections of the code of criminal procedure regarding grand jurors, or the rules adopted pursuant thereto, shall be subject to the penalties provided in said article of the penal law.

§ 607. Trial jurors drawn for court of record to serve in other parts, terms or courts.

Trial jurors drawn for service in any court of record must serve as trial jurors in any other term or part of the same court when it sits in terms or parts, or, by consent of such court, in any other court of record sitting at the same time in the same courthouse. They may also so serve in any court of record sitting in the same county. When so serving in such other term, part or court their service shall be with the same power, force and effect as if they had been drawn as trial jurors for service in such other term, part or court.

§ 608. Sheriff's jurors.

The county clerk of each county in a city having a population of one million or more shall select annually from the persons qualified to act as trial jurors, the names of such number of persons as he deems necessary to constitute the sheriff's jurors for that year.

The county clerk shall draw and summon panels of sheriff's jurors, upon request of the sheriff.

APPENDIX C

Rules Relating to the Jury System in the City of New York

Pursuant to the provisions of section 592 of the Judiciary Law, as added by chapter 202 of the Laws of 1940, the Justices of the Appellate Division of the Supreme Court in the First and Second Judicial Departments, acting jointly, do hereby adopt the following rules in relation to the jury system in the City of New York:

PART A.—Rules Relating to Jurors Generally.

Rule I.

Subpoenaing for Examination.

No person shall be selected to serve as a juror unless the county clerk has passed upon his qualifications in accordance with the provisions of article seventeen of the Judiciary Law. For this purpose the county clerk may cause to be served upon any person in the county a subpoena requiring such person to appear before him for the purpose of testifying under oath as to the competency, qualifications and liability of himself or any other person to serve as a juror and to present claims for exemption or disqualification. Such person shall not be entitled to any fee or mileage. Such subpoena may be served personally or by leaving it at the person's residence or place of business with a person of suitable age and discretion, or by mail. If served personally or by substitution the subpoena shall require the person summoned to attend not less than three days after service. If served by mail the subpoena shall require the person summoned to attend not less than five days after the mailing thereof.

One or more successive subpoenas may be served upon the same person where he fails to attend as required by a former subpoena. Where a person has so attended twice and furnished all information required, he shall not be required to attend again for one year thereafter. But the county clerk may, in his discretion, dispense with the personal attendance of the person so notified where another person cognizant of the facts is produced and testifies in his stead and it appears from the testimony of such other person that the person notified is disqualified, not qualified or exempt.

Rule II.

Examination—Questionnaires—Index Cards or Books.

Every person appearing for examination as a juror shall be required to fill out, in his own hand, sign and swear to, a written questionnaire. Each questionnaire shall be contained on a card or other paper of a size convenient for handling and shall be in the form prescribed by rule seventeen.

In addition to the questionnaire there shall be made out for each person appearing for examination an index card containing the name of said person, whether he has qualified for jury service or whether he is disqualified, has been rejected, or is otherwise not liable for service, whether he has been chosen for the grand, special or sheriff's jury, and such other information as may be deemed desirable by the county clerk and which may be conveniently inserted on the card. These cards shall be filed alphabetically according to the last name of the person regardless of whether or not he is liable for jury service. They shall be keyed to the questionnaires and shall constitute an index of all persons appearing before the county clerk for qualification as jurors. They shall be kept, if possible, in a visible index file.

A county clerk, instead of using index cards, may keep the required information in properly indexed books. In such event, whenever index cards are referred to in these rules, the reference shall be deemed to include such books.

After the person has filled out the questionnaire he shall be personally interviewed, under oath, by the county clerk.

After the person's examination is concluded and he is found otherwise qualified, his name shall be forwarded to the police department for checking against the records of that department, subject to the provisions of section five hundred ninety-five of the Judiciary Law.

Upon the basis of the questionnaire, the personal interview and the check against the police records, the county clerk shall decide whether the person interviewed is qualified to serve as a juror. In accordance with the decision he shall note on each questionnaire in a prominent place whether the person has been accepted, or found disqualified, not qualified or granted exemption; if accepted, the jury upon which he has been placed shall be noted; if disqualified, not qualified or granted exemption, the reason shall be noted. Where jurors are not qualified, the reason therefor may be indicated by appropriate language or by the symbols R1, R2, R3, R4, R5 and R6 representing the six subdivisions of section five hundred ninety-six of the Judiciary Law. Likewise, exemptions may be indicated by appropriate language or by the symbols E1, E2, E3, E4, E5, E6 and E7 representing the seven subdivisions of section five hundred ninety-nine of the Judiciary Law, and disqualifications may be indicated by appropriate language or by the symbols D1, D2, D3, D4, D5 and D6 representing the six subdivisions of section five hundred and ninety-eight of the Judiciary Law.

There shall be continuous search for persons qualified and liable for jury service, in order to obtain as many prospective jurors as possible and to limit as much as possible repetition of jury service. Before subpoenaing

persons for examination, the county clerk shall check their names against the index cards of names of persons previously examined in the county clerk's office.

Rule III.

Filing Questionnaires.

The questionnaires of persons accepted and the questionnaires of persons rejected shall be filed separately, each in alphabetical order. Whenever any person qualified for jury service becomes exempt or disqualified for reasons accruing since his examination, his questionnaire shall be marked accordingly and transferred to the inactive file. The index card of such person shall also be marked accordingly.

The questionnaires of persons who shall be or shall have become disqualified for jury service because of age or who shall have died shall be kept at least for one year thereafter.

The questionnaires of persons selected to serve as grand, special or sheriff's jurors shall be filed as separate categories, each in alphabetical order. Whenever any person has completed the period for which he has been selected to be a member of the grand, special or sheriff's jury, his questionnaire shall be returned to the file of general trial jurors.

Rule IV.

Notification of Acceptance as Juror.

After a person has qualified satisfactorily for service as a juror, the county clerk may, in his discretion, issue a notice to such person, informing him that he has been found qualified to serve as a juror and that he will be notified when he has been drawn for actual service. The notice shall also request such person to inform the county clerk if he becomes entitled to exemption and claims such exemption or becomes disqualified at any time after his examina-

tion, and shall also request him to inform the county clerk of changes in address or occupation and of any other information which is thought desirable.

Rule V.

Preparation of Ballots—General Ballot Box.

The county clerk shall prepare a ballot for each person as soon as such person has qualified for jury service. The ballot shall contain the name, occupation, address and number of the juror and such other information as the county clerk deems necessary. The ballots shall be kept in a box, to be known as the general ballot box and shall be retained in the office of the county clerk and shall be kept securely locked and sealed except at the time of authorized drawings when it shall be opened in the presence of the judge supervising the drawing and after the drawing shall be again sealed in the presence of said judge. Such general ballot box is to be constructed cylindrical in form with an aperture large enough only to admit conveniently the hand of the person by whom the ballots are to be drawn, the aperture to be provided with a cover so arranged as to be conveniently locked and sealed when closed.

At the time of each authorized drawing the ballots made out since the last drawing shall be placed in the general ballot box after the drawing of jurors is completed, or during the course thereof if the box becomes empty, and before the box is again sealed.

All jurors except grand, special and sheriff's jurors shall be drawn from the said general ballot box.

In lieu of the foregoing, the county clerk for Bronx County or for New York County may at his option keep all ballots, except for those persons on a grand, special or sheriff's jury list, in a securely locked, sealed receptacle in the county clerk's office. Such receptacle may be opened only in order that the ballots may be checked and revised or additional ballots added thereto or, in preparation for

an authorized drawing, to transfer ballots therefrom into a wheel constructed as set forth in this rule. Such receptacle may only be opened for such purposes in the presence of and under the supervision of one of the judges designated by the Justices of the Appellate Division pursuant to section six hundred and two of the Judiciary Law after due notification to attend pursuant to rule six. If this optional method has been followed, such receptacle or wheel, whichever shall be appropriate, shall be deemed to be referred to in these rules whenever the phrase "general ballot box" is used.

Rule VI.

Notice to Judges.

At least three days before a drawing the county clerk must notify in writing the judge or judges of courts of record designated by the Justices of the Appellate Division, to attend at his office on a day designated by him, not more than forty nor less than fourteen days before the day appointed for holding a term of court at which issues are triable by a jury, in order to supervise the proper drawing of trial jurors for that term.

A drawing shall be held if one of such judges shall be present on the designated day; otherwise, the county clerk must again notify such judge or judges. Where it is necessary to renotify a judge or judges of a drawing, such notification may be oral and a reasonable period of time shall be given.

Rule VII.

Mode of Drawing.

The drawing must be conducted as follows:

1. The county clerk must shake the box or turn the wheel containing the ballots so as to mix them thoroughly.

2. He must then, without seeing the name contained on any ballot, publicly draw the ballots out of the box until the requisite number has been drawn.

3. As each ballot is drawn from the general ballot box, it may be checked against the index cards or questionnaires or a list prepared by the county clerk and if it is noted thereon that:

(a) The person whose name appears on the ballot is not liable or qualified for jury service for cause accruing since his examination, or that

(b) the person whose name appears on the ballot has been placed on the grand jury list, the special jury list or the sheriff's jury list the ballot shall be destroyed forthwith or may be set aside and retained in a separate receptacle for not more than two months, such ballots being marked with the reason for such disposition.

4. As each ballot is drawn consideration may, in the county clerk's discretion, be given to the time of year when the juror would prefer to serve.

5. The minute of the drawing must be kept by one of the attending officers who must enter therein the name contained in each ballot drawn, the number assigned to each ballot drawn, and specify for what court and for what time or part each was drawn. The minute of each drawing shall be signed by the county clerk and the attending officers, and filed in the county clerk's office, where it shall be open to inspection.

6. Approved ballots drawn from the general ballot box shall be placed in separate receptacles according to the courts for which they are drawn and shall be kept in such receptacles until the adjournment of the part or term for which they are drawn and shall then be disposed of in accordance with the provisions of rule fifteen as set forth below.

7. When assigning jurors who have been drawn for service in a district of the Municipal Court of the City of New York in a borough which does not have a central jury part, consideration shall be given to the residence or the place of business of such jurors in order that they shall not be unduly inconvenienced.

Rule VIII.

Number of Trial Jurors to be Drawn.

The county clerk shall draw for each term and each separate part of a term of a court of record at which issues of fact are triable by a jury, such number of trial jurors as he believes necessary and sufficient, unless otherwise specified by general order of the court or by a written order of the judge appointed to hold the part or term. Where, in pursuance of the provisions of rule seven, it is necessary to set aside ballots drawn from the general ballot box, the ballots so set aside shall not be considered as part of the number required to be drawn.

Rule IX.

Special Jurors—Ballots and Drawing.

The county clerk shall prepare ballots for every name on the special jury list in the same manner as for trial jurors and shall deposit them in a receptacle to be known as the special jury ballot box which shall be retained in the office of the county clerk and shall be kept securely locked and sealed except at the time of authorized drawings.

The drawings of special jurors shall be conducted in the manner prescribed by law for drawing trial jurors.

A minute of such drawing shall be kept, signed and filed in the same manner as for trial jurors.

This rule shall apply except where inconsistent with statute or rule adopted pursuant to section seven hundred forty-nine-aa of the Judiciary Law.

Rule X.

Sheriff's Jurors—Ballots and Drawing.

The county clerk shall prepare ballots for every name on the sheriff's jury list in the same manner as for trial jurors; and shall deposit them in a receptacle to be known as the sheriff's jury ballot box which shall be retained in the office of the county clerk and shall be kept securely locked and sealed except at the time of authorized drawings.

The drawings of sheriff's jurors shall be conducted in the manner prescribed for trial jurors.

A minute of such drawings shall be kept, signed and filed in the same manner as for trial jurors.

Rule XI.

Length and Time of Service of Trial Jurors.

Trial jurors drawn for a term or a part of a term of any court of record in the Counties of New York and the Bronx shall serve only for two weeks or half a term. Trial jurors drawn for a term or a part of a term or terms of any court of record in the Counties of Kings, Queens and Richmond shall serve for a period not exceeding two weeks or half a term, unless a majority of the Justices of the Appellate Division in the Second Department make an order directing otherwise as to the jurors for any court or term of any court. Such jury service shall, however, continue beyond said periods until the conclusion of any trial on which the jurors may be engaged.

Subject to the above, the county clerk in each county may designate the dates when periods of jury service shall commence.

Rule XII.

Notification of Jurors.

The county clerk must notify each juror named in the minute of trial jurors drawn to attend the term or the part for which he was drawn by serving upon him a notice,

addressed to him, stating that he has been drawn as a trial juror for, and is required to attend, the term or the part specified in the notice on the days specified therein. The notice may contain copies of such portions of article seventeen of the Judiciary Law of sections seven hundred and fifty and seven hundred and fifty-one of the Judiciary Law, and of article one hundred and sixteen of the Penal Law, as he deems advisable.

The notice may be served personally or by leaving it at the juror's residence or place of business or employment with a person of suitable age and discretion at least six days before the beginning of the term or the part for which the juror is drawn. Such notice may also be served by mail if mailed at least nine days before the day appointed for such juror to appear, in which case said notice shall be enclosed in a securely closed postpaid wrapper, addressed to such juror at his residence or place of business or employment and properly posted. If the notice is mailed and is returned by the post office undelivered, it may be remailed to the same address or any other address for the juror which the county clerk may have, not less than two days, exclusive of Sundays or holidays before the day appointed for such juror to appear.

Rule XIII.

County Clerk to Notify Court Clerk.

Before the commencement of the term or part the county clerk must file with the clerk of the court for which jurors are drawn a certified copy of the minute of the drawing, with a return under his hand, indorsed thereupon or annexed thereto, naming each person notified, the time for which he was notified to appear and the time, place and manner of service. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom each service shall have been made, stating the manner, time and place of such service, shall accompany such return.

Rule XIV.

Report by Court Clerk After Conclusion of Service of Jurors.

The clerk of each court for which trial jurors have been drawn shall, within ten days after the close of each term of service of jurors or after the discharge of the jurors if they are discharged before the close of their term of service, file with the county clerk the certified copy of the minute of the drawing of jurors received from the county clerk before the beginning of the term and the county clerk's return thereto, or a copy of such paper certified by the clerk; together with each notice or other paper attested by a judge in regard to the excusing of jurors. The clerk must also deliver to the county clerk therewith his certificate specifying distinctly and in detail as follows:

1. The name and residence of each juror who attended and served; the number of days the juror attended for the purpose of serving; and the number of days he actually served.

2. The name and residence of each juror who was excused, discharged, exempted or declared disqualified by a judge of the court together with any affidavit, certificate or other document or paper submitted by the juror at the time that he was excused, discharged, exempted or declared disqualified.

3. The name and residence of each person notified who did not attend or serve.

4. The name and residence of any person found guilty of contempt of court and the penalty, if any.

The above papers must be filed in the office of the county clerk and shall not be altered or corrected except in pursuance of an order of the court.

Rule XV.

Proceeding Subsequent to Return of Court Clerk's Certificate—Replenishing General Ballot Box.

Upon receipt by the county clerk of the certificate of the court clerk, the information therein contained shall be entered on the record of service of each person named. The proper notations shall also be made on the index cards of the persons named. If the person has become disqualified or exempt or a nonresident or has died, the ballot shall be destroyed forthwith or may be set aside and retained in a separate receptacle for not more than two months, such ballots being marked with the reason for such disposition, and the questionnaire transferred to the inactive file. There must be entered on the questionnaire the reason why the ballot was so disposed of.

The other ballots shall be disposed of as follows:

1. Ballots of persons excused shall be kept out of the general ballot box for the period during which excused and shall then be returned to the general ballot box after the necessary clerical notations have been made.

2. Ballots of persons who have been excused to, or whose time of service has been postponed to some future time, shall be kept apart until such future date at which time they shall be deposited in a separate ballot box. When a drawing of jurors is held for such time, jurors shall first be drawn from such box.

3. Ballots of persons who appeared for service and served for at least five days shall be placed in special receptacles dated according to the month and year when they last served in order to assure their not being required to serve again within two years after appearance for their last service, and shall be kept out of the general ballot box until that time, when they shall be returned to the general ballot box.

Rule XVI.

Additional Jurors.

At any time during the sitting of a term of a court in the county, the court may direct an additional number of trial jurors to be drawn for the term or for the part at which the order is made. The order must specify the number of jurors to be drawn and the time of drawing. The drawing shall be held in the office of the county clerk in the manner provided for regular trial jurors, except that notice is not required.

The county clerk must forthwith notify the additional jurors thus drawn by such a notice as the court directs, to attend the term or part at the time specified in the order. The county clerk must forthwith file with the clerk of the court for which additional jurors were drawn a return, under his hand, naming each person notified as prescribed above and specifying in each case the manner, time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom the service shall have been made, stating the manner, time and place of such service, shall accompany such return.

Rule XVII.

Form of Questionnaire.

The questionnaire to be filled out by prospective jurors shall contain the following information and shall be in such form as the county clerk may prescribe:

Qualifications to Serve as Juror

State of New York, County of ..... ss.:

Date	Result	By Whom Examined
	[Do not write in this box]	

The undersigned, being duly sworn, makes the following answers [Explanations or remarks concerning answers may be made in ruled box on reverse side]:

1. Print name in full .....

First name

.....

Middle name Last name

Married Single Widower
Divorced Separated No. of Children

2. Date of birth [Month day year]

Color Color hair Color eyes
Wear glasses Distinguishing physical characteristics Weight Height

3. Residence Apt. No. Tel. No.

4. Are you the tenant If not, with whom do you live How long living at present address How long in N. Y. State
In County

5. Former residences for past six years

6. Give any other name you have used or been known by Did you register at last election
Where did you live then

7. Place of Birth [City State]
If not American born, how became citizen
When naturalized Where

8. Education: Primary, High School, College, degrees, special studies, etc.

9. Occupation Employed at present
Business Address Tel. No.

10. Firm name of employer How long in present employment

11. What other employment during past six years

12. Wife's name Her occupation
Her firm Her business address

13. Do you or your wife own property (such as bank account, furniture, insurance, trust funds, stocks, bonds, mortgages, land, etc.) worth $250
Describe property

14. Are you employed on a Federal, State or City Public Works Project Are you on relief
Ever served as a juror
In what court and when did you last serve

15. Ever been denied listing as a qualified juror or been stricken from any list of jurors
Where and why

16. Are you physically disabled or incapacitated
Is your hearing or eyesight so impaired that you could not intelligently follow a case in court
Ever confined to a State or Private Institution

17. If your answer to any question on line 16 is "yes," give all particulars

18. Ever arrested or indicted on a criminal charge
Ever convicted
Have you ever had any trouble with the authorities
This includes a violation of a traffic ordinance, or statute or any other ordinance
Any judgment ever been entered against you in a civil court on allegations of fraud or misconduct

19. Any judgments outstanding against you
Nature of actions in which obtained

20. Have you ever been in bankruptcy or made a general assignment for the benefit of creditors
Have you conscientious scruples against the death penalty which would preclude you from finding a defendant guilty if the crime charged be punishable by death

21. Have you such opinions as would prevent a verdict of guilty in a criminal case upon circumstantial evidence Do you doubt your ability to lay aside opinions or impressions, the result of newspaper reading or hearsay, and render an impartial verdict upon the evidence

22. Are you aware of any prejudice against any State law which would prevent a finding of guilty for violating such law Have you such a prejudice against any particular defense to a criminal charge as would prevent your finding a fair and impartial verdict upon its merits

23. By law the failure of a defendant in a criminal case to testify is not considered as any evidence of his guilt. Would you give a defendant the benefit of this law What months of the year between October 1 and June 30 would you prefer to serve (Name at least two months)

24. Is there anything which would influence you as a juror, as affecting any person, or class of persons because of nationality, sex, color, race, religion, wealth, occupation, political affiliation, social or economic belief or any other reason

Sworn to before me this day of 19

The foregoing answers are true in all respects

Sign Here .....

Month Service Preferred												Cap. Pun.						
Name			Residence			Occupation			Business Address					Date of Birth				
1	2	3	4	5	6	7	8	9	10	11	12	Yes	No			AJ	SJ	PJ	Sh. J

(*Reverse side of questionnaire*)

State of New York,
County of ss.:

being duly sworn, deposes and says: I do not dwell or lodge in the County of for the greater part of the time between the first day of October and the thirtieth day of June next thereafter, and I am not a resident of said County; but I reside permanently at , City of , County of , State of , and have resided there since

.....

Sworn to before me, this day of 19

.....

Deputy County Clerk

State of New York,
County of ss.:

being duly sworn, deposes and says: I am entitled to and claim exemption; I am disqualified; from doing jury service for the following reason

.....

Sworn to before me, this day of 19

.....

Deputy County Clerk

Explanations of any answers on opposite side of this form, or remarks, may be made here

(ruled box)

RECORD OF JURY SERVICE

Date Placed in Wheel	Term Drawn	Court	Days Served: Days in Attendance	Days Served: Days Actually Served	If Excused Reason

(16 lines)

Changes of Address

Business Address
Residence

PART C.—RULE OF CONSTRUCTION.

RULE XXX.

Rule of Construction.

Whenever a word of masculine gender is used in these rules, it shall be understood to apply to female as well as male jurors.

APPENDIX D

Excerpts from the Reports of The Judicial Council of the State of New York

Third Annual Report of The Judicial Council of the State of New York (Legislative document No. 48, 1937), pp. 123-128):

"The Judicial Council recommends legislation abolishing struck juries, foreign juries and special juries. A well-considered jury system will insure an impartial cross-section of the community on every petit jury. The limitation of jury exemptions put into effect in 1936 upon recommendation of the Judicial Council and the proposal for women jurors are a part of this plan to provide petit juries of such uniformly high calibre for both civil and criminal cases that there will be no need for extraordinary juries.

* * * * * * *

The struck jury in civil cases and special jury in civil and criminal cases, although designed to provide more intelligent and capable jurors in exceptional cases do not necessarily bring about the desired result. Both types of juries are selected from the ordinary jury list. Restrictions placed upon their choice do not distinguish them particularly from ordinary juries and are similar to restrictions placed by the courts upon the regular choice of any juror."

* * * * * * *

Struck and Special Juries

The cardinal features of the special and struck juries are much the same—that the issue to be tried is either so extraordinary or intricate or that such a state of public excitement exists, as to render it unlikely that a fair and impartial trial can be had unless more than ordinary care is exercised in the selection of a jury. They differ, however, in the method of selection.

In New York, the present struck jury provisions stem from the Revised Statutes of 1829-30 [2] and come down through the Code of Civil Procedure.[3] The present provisions were derived, almost verbatim, from the Code, sections 1063 and 1067 becoming Civil Practice Act section 449, and the remaining sections becoming sections 749-a through 749-e of the Judiciary Law.

Struck juries may be obtained throughout the State on demand of either party, the party making the application being responsible for the cost of striking the jury. Civil Practice Act, section 449, provides that in any action triable in the Supreme Court, where it appears to the court that the action requires such a jury, it is mandatory upon the court to so order. Section 449 further provides that such jury shall be struck in the manner provided by the Judiciary Law.

Sections 749-a through 749-e of the Judiciary Law govern the striking of a jury. The commissioner of jurors or the county clerk, as the case may be, in the presence of the parties, selects from the general jury list the names of forty-eight persons whom he deems most indifferent between the parties and best qualified to try the case. These are the only qualifications required other than the general qualifications of the Judiciary Law applicable to all jurors. The parties then beginning with the party on whose application the jury was ordered to be struck, alternately strike off twelve names each from the list. The jury is chosen from the remaining twenty-four names.

Several states, including Michigan,[4] Delaware,[5] Virginia,[6] West Virginia [7] and Indiana [8] provide for such a jury.

The special jury was first established in 1896,[9] for criminal cases in counties with a population of over five hun-

[2] 2 R. S. 418, sec. 46 through sec. 50; 2 R. S. 419, secs. 51, 52.
[3] C. C. P. sec. 1063 through sec. 1069.
[4] 1929 Compiled Laws, secs. 14294-14300.
[5] 1915 Revised Code, secs. 4274-4276.
[6] 1919 Va. Code, sec. 6005.
[7] Michies Code, sec. 5647, ch. 56, art. 6, sec. 13.
[8] 1926 Burns Revised Statutes, secs. 1827-1829.
[9] L. 1896, ch. 378.

dred thousand, to be drawn in each case by a special jury commissioner from a specially selected list. This statute was repealed in 1901,[10] but the same type of special jury was simultaneously re-established.[11] At present a special jury can be drawn for both civil and criminal actions in all courts of record in counties having a population of one million or more or a county having a population of four hundred thousand or more adjoining a county having a population of one million. This provision, therefore, now applies to the counties of New York, Kings, Queens, Bronx and Westchester. A similar and apparently overlapping provision, specifically for Kings county, had been enacted by Laws of 1902, chapter 564.

In these counties, it is provided that the commissioner of jurors shall select from among those persons qualified to serve as trial jurors, such persons as he deems qualified, after a personal examination, to serve as special jurors.

No one is eligible to serve as such special juror who is opposed to the death penalty or who is influenced by the newspapers or unable to render an impartial verdict, or opposed to circumstantial evidence, or who is prejudiced against a law of the state, or prejudiced against a particular defense to a criminal charge or who cannot in all cases give to the defendant failing to testify in his own defense the full benefit of the statutory provision that such defendant's neglect or refusal to testify shall not create a presumption against him.

Application for a special jury may be made by either the district attorney or defendant in criminal actions or by either party in civil cases. It is discretionary with the court to order such a jury drawn where it appears necessary because of the importance or intricacy of the case or because the subject-matter has been so widely commented on that it would take too long to obtain an ordinary jury

[10] L. 1901, ch. 601.

[11] L. 1901, ch. 602 as amended by L. 1904, ch. 458, L. 1913, ch. 587, L. 1920, ch. 112, L. 1923, ch. 742.

or that for any other reason the due, efficient and impartial administration of justice would be advanced by trial by a special jury.

The provisions for struck juries were designed to provide more intelligent and capable juries in exceptional cases. However, such a jury is a special one only because it is selected in a particular manner. It is not special in the sense of providing persons better qualified than the ordinary jurors. Since the persons from whom a jury is struck are selected from the ordinary jury list, the only additional qualifications being that they shall be those whom the commissioner of jurors or the county clerk deems most indifferent between the parties and best suited to the case, there is no reason to suppose that they will be superior to the other persons on the general list from which they come. As a practical matter, the chief effect of the struck jury would seem to be that each side is given ten more peremptory challenges upon payment of the added expense.

Struck juries may have been suited to conditions a century ago but they no longer have practical use and are inconsistent with the present practice of jury pooling. In the larger counties it would be difficult for the commissioner of jurors to choose forty-eight names from a list of thousands with any real knowledge of their qualifications. In the smaller counties, on the other hand, where the parties to an action usually know the prospective jurors, the result of striking a jury would probably be the obtaining by each side of a jury as partial to its own interests as possible.

The Judicial Council has inquired as to the use of struck juries in every county of the State during the past five years. The responses indicate that the struck jury is almost never used. Only one county reported one struck jury during the five-year period. In many counties no jury had been struck in from ten to twenty years. There is no reason for keeping on the statute books a provision that is practically obsolete.

The courts have recognized the fact that struck juries are no longer desirable. In *Jerome* v. *The New York Evening Journal Publishing Company*, First Dept. (1908), 124 A. D. 372, the appellant appealed from an order of the Supreme Court providing that a jury be struck in accordance with the application of the respondent. The Appellate Division agreed that this case presented unusual features which should be tried by jurors of more than general knowledge and intelligence but declared that since in important cases it had been found impractical to fill the jury box from the list of struck jurors, and in view of chapter 602 of the Laws of 1901, as amended by chapter 458 of the Laws of 1904, providing for a special jury in New York county, it directed trial by a special jury instead of by a struck jury. The Judicial Council has been informed by the commissioner of jurors for New York county that no struck jury has been drawn in New York county since this decision.

In the case of *People* v. *McClellan*, First Dept. (1908), 124 A. D. 664, the defendant was granted a motion for a struck jury. Upon plaintiff's appeal, the Appellate Division affirmed the order but declared that there was presented "* * * a case of the gravest importance. * * * For these reasons it is proper that it should be tried before a jury specially selected. We consider, however, that an impartial and satisfactory jury can be more surely and speedily obtained by a resort to the special jury panel provided for by chapter 602 of the Laws of 1901, as amended by chapter 458 of the Laws of 1904, than by an attempt to procure a struck jury."

The special jury, however, as provided for by Laws of 1901, chapter 602, although it was an attempt to provide a jury of persons with special qualifications is subject to the same criticisms as the struck jury.

Special jurors, like struck jurors, are chosen from the regular jury list; therefore they are not more specially qualified than the other persons on the list. Although the commissioner of jurors selects special jurors after per-

sonal examination, the restrictions he is required to apply to prospective special jurors are in no way different from those applied by the courts to jurors chosen in the regular manner. A well-administered ordinary jury system should produce jurors of as high calibre for every action as the special jury system attempts to provide in exceptional cases.[12]

Recommendations

To effect the abolition of foreign, special and struck juries, the Judicial Council recommends the following:

1. Repealing Civil Practice Act section 449, establishing struck juries.

2. Repealing Judiciary Law section 749-a through section 749-e, governing the striking of a jury, and sections 749-f and 749-g, governing mode of obtaining a foreign jury.

3. Repealing Judiciary Law section 538-a, providing that the sheriff shall notify jurors drawn for a struck jury.

4. Amending Laws of 1895, chapter 369, by repealing section 48, providing that the commissioner of jurors of Erie county shall preside at the striking of a jury.

5. Amending Laws of 1904, chapter 232, by repealing section 28, providing that the commissioner of jurors of Westchester county shall preside at the striking of a jury.

6. Amending Laws of 1897, chapter 346, section 22, as amended by Laws of 1900, chapter 565, by removing the words 'struck' and 'special' from the provision

[12] This conclusion has also been reached by the Massachusetts Judicial Council, which, in studying the matter determined that special petit juries are unnecessary. Tenth Report of the Massachusetts Judicial Council, Nov. 1934, p. 44-46

that in Monroe county 'Nothing herein shall abridge or interfere with the power of the court to summon talesmen, struck, special or additional jurors * * *.'

7. Amending Laws of 1902, chapter 564, providing for a commissioner of jurors and for special jurors in Kings county by repealing sections 8-15, inclusive, governing the choice of special jurors. These sections should be repealed in any event since Kings county is now included in the provisions of Laws of 1901, chapter 602, as amended by Laws of 1920, chapter 112.

8. Amending Laws of 1901, chapter 602, establishing for certain counties, commissioners of jurors and special juries, by repealing sections 2 through 9 governing special juries, as amended by Laws of 1904, chapter 458; Laws of 1918, chapter 587; Laws of 1920, chapter 112; Laws of 1923, chapter 742."

Fourth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 48, 1938), pp. 46-48:

"Abolition of Special Juries

The Judicial Council has been attempting to improve the general jury system to such a point that extraordinary juries of any kind will no longer be necessary. To this end, the Council recommended women jurors, limitations on jury exemptions, and the abolition of struck, foreign and special juries, all of which recommendations were put into effect, except the abolition of special juries. Upon reconsideration and further study, the Council renews its recommendation for the abolition of special juries. These, popularly known as "blue ribbon" juries, are confined to the counties of New York, Bronx, Kings, Queens and Westchester.

The special jury, although designed to provide more intelligent and capable jurors in exceptional cases, both civil and criminal, does not necessarily bring about the

desired result. The jurors composing it are chosen from the ordinary jury list. The only method of choice distinguishing special from ordinary jurors is a personal interview of each special juror with the Commissioner of Jurors. The questions put by the Commissioner of Jurors to the prospective special jurors to determine their eligibility are similar to those usually put to an ordinary juror by counsel.

A more serious charge than its uselessness has been levelled at the special jury. It has been suggested that, by a process of eliminating jurors who have previously served on a special jury which has ended in acquittal or disagreement, special juries are particularly chosen to be convicting juries. Data gathered by the Judicial Council on the use of special juries during the five-year period July 1, 1932 to June 30, 1937, in the counties of New York, Bronx, Kings and Queens, indicate that special juries are prone to convict. During the period studied, of 383 defendants tried before special juries, 78 per cent were convicted and 22 per cent were acquitted. It should be noted that in the 383 cases, only five defendants demanded a special jury. In all other cases, the application was made by the people.

To compare the special with the ordinary juries, a study was made of all homicide cases, except those involving negligence or automobiles, tried during 1933 and 1934. The percentage of convictions to acquittals was much higher in cases tried by special juries than in cases tried by ordinary juries. During the calendar year 1933, of the 47 defendants tried for homicide before special juries 83 percent were convicted and 17 percent were acquitted. During the same period, of 156 defendants tried for offenses of the same grade by ordinary juries, 43 percent were convicted and 57 percent were acquitted. In 1934, of 72 defendants tried before special juries, 82 percent were convicted and 18 percent were acquitted, while of 191 defendants tried by ordinary juries, 37 percent were convicted and 63 percent were acquitted (see Table II below).

It is significant also that the percentage of defendants pleading guilty to a lesser offense was much higher in cases to be tried before special juries than those to be tried by ordinary juries. In 1933, for example, 26 percent of 47 defendants to be tried before special juries and only 9 percent of the 156 defendants to be tried before ordinary juries pleaded guilty to a lesser offense. In 1934, 39 percent of 72 defendants and 2 percent of 191 defendants to be tried before special and ordinary juries respectively, pleaded guilty to lesser offenses. Thus, defendants to be tried before special juries seem to realize that their chances of complete acquittal are much less than if they were to be tried before ordinary juries.

The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases.

The tables of data from which the above information is taken follow:

I

Disposition of Criminal Cases in Which Special Juries Were Ordered in the Counties of New York, Bronx, Kings and Queens July 1, 1932-June 30, 1937

County	Defendants	Convicted offense charged	Convicted lesser offense	Pleaded guilty	Total convicted	Acquitted, indictment dismissed, discharged from custody
New York	202	61 30%	28 14%	62 31%	151 75%	51 25%
Bronx	43	20 47%	1 2%	16 37%	37 86%	6 14%
Kings	103	45 44%	17 17%	23 22%	85 83%	18 17%
Queens	35	5 14%	7 20%	14 40%	26 74%	9 26%
Totals	383	131 34%	53 14%	115 30%	299 78%	84 22%

II

Disposition of Homicide Cases Other Than Those Involving Negligence or Automobiles in the Counties of New York, Bronx, Kings and Queens January 1-December 31, 1933 and January 1-December 31, 1934

	Special Jury				Ordinary Jury*			
	1933		1934		1933		1934	
	No.	%	No.	%	No.	%	No.	%
Defendants	47		72		156		191	
Convicted, offense charged	17	36%	15	21%	53	34%	67	35%
Convicted lesser offense	10	21%	16	22%				
Pleaded guilty to lesser offense	12	26%	28	39%	14	9%	4	2%
Total convicted	39	83%	59	82%	67	43%	71	37%
Acquitted, indictment dismissed, discharged from custody	8	17%	13	18%	89	57%	120	63%

* Figures obtained from Department of Correction.

Fifth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 48, 1939), p. 42)

"Abolition of Special Juries

In the Fourth Annual Report of the Judicial Council it was stated:

> 'The Judicial Council has been attempting to improve the general jury system to such a point that extraordinary juries of any kind will no longer be necessary. To this end, the Council recommended women jurors, limitations on jury exemptions, and the abolition of struck, foreign and special juries, all of which recommendations were put into effect, except the abolition of special juries. Upon reconsideration and further study, the Council renews its recommendation for the abolition of special juries.*
>
> 'The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases.'

The Council's Report pointed out in addition that the legal requisites prescribed for the special juries are substantially the same as the legal requisites prescribed for a general or ordinary jury.

In consequence, as might have been expected, such a special juror inevitably feels superior and such a special jury system becomes distinctly un-American and not consonant with a trial by one's peers.

Those who have sought to retain the special jury for criminal cases in the four counties of New York, Bronx,

* Special juries are permitted only in the counties of New York, Bronx, Kings, Queens and Westchester. And although Westchester county under the law is entitled to have special juries, they are not used and no special jury panel exists there.

Kings and Queens, have insisted that there is a practical although perhaps no theoretical necessity for the special jury, inasmuch as the quality of the jurors serving on the general jury in the four counties in question has in the past been inadequate, principally because the requirements set forth by law have not been insisted upon. In other words, the defect was one not so much of law as of the administration or application of the law."

Sixth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 48, 1940), p. 197:

"Two important matters which have not been changed in this proposal require comment.

In regard to special jurors, it should be noted that their abolition is not recommended in this proposal. This, however, is not to be construed as in any way indicating a withdrawal from the Judicial Council's former position regarding special juries which the Council considers un-American and undesirable for the reasons set forth in previous Reports of the Council. (See Third Annual Report of the Judicial Council, p. 121; Fourth Annual Report of the Judicial Council, p. 46; Fifth Annual Report of the Judicial Council, p. 42.)"

Eighth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 16, 1942), pp. 39-41:

"Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens

Since 1937 the Judicial Council has been recommending the abolition of special juries as undesirable and un-American. (Third Report, pp. 34, 121-128; Fourth Report, pp. 46-48; Fifth Report, p. 42.) In 1941 the Legislature by Chapter 402, abolished special juries in the counties of Westchester—population 569,422—and Nassau

—population 404,888—(see *supra*, page 24). Thus, special juries at present exist only in the counties of New York, Bronx, Kings and Queens. In its Fourth Annual Report the Council stated (page 47):

> 'The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases.'

The goal of a higher calibre of jurors *has now been achieved* under the new method of jury selection for the city of New York which went into effect September 1, 1940 upon recommendation of the Judicial Council and which now applies to *all* jurors those high standards which formerly were required only of special jurors.

The Judicial Council therefore again renews its recommendation for the abolition of special juries because:

a. The need in certain cases for better jurors was in the past the only valid objection to the abolition of special jurors. This objection, as stated above, has now been entirely overcome.

b. The undesirable features of a special jury are still present.

Some opponents of the Council's recommendation have now conceded that the Council's position is well taken. The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York in its 1940 Reports, Memo. No. 65, page 169, withdrew its former opposition and stated:

> 'In a previous report * * * this committee disapproved a bill (S. P. 180, * * *; A. Pr. 210, Int. * * *) seeking to abolish the blue ribbon jury. The basis of this action was that the reform of the methods of selecting jurors is a prerequisite to the elimination

of the blue ribbon system. The enactment of the bill under consideration [putting into effect the new jury system] would satisfy this condition and would eliminate the chief basis of the committee's action with regard to S. Pr. 180, A. Pr. 210. In such event, the committee would approve S. Pr. 180, A. Pr. 210."

Similarly, some of the officials most directly concerned had conceded that objection to the abolition of special juries would be met if all jurors were selected according to the provisions of the Judiciary Law with attention to the qualifications and disqualifications as therein set forth.

Not only is this now the case but the requirements for an acceptable juror have been made much more stringent than heretofore. Each prospective juror is searchingly examined and his qualifications carefully checked. The new system of jury selection is based on the best business-like and up-to-date administrative methods.

The Judicial Council has been advised by the four county clerks of the counties concerned that all jurors now serving and available for service have been qualified and examined under the new system. The Council has further been informed by the county clerks, as well as by others in a position to know, that the calibre of general jurors has greatly improved since the establishment of the new system.

Special juries are now practically confined to the trial of murder charges. From July 1, 1932 to June 30, 1941 every application for a special jury was made by the people.

It has been said that the abolition of special juries will result in too great a loss of time at the trial of actions where the crime charged is punishable by death, by reason of the possible drawing of jurors opposed to capital punishment. This matter, however, has been taken into account under the revised jury system in section 597 of the Judiciary Law which reads as follows :

'§ 597. Juror with scruples against death penalty. No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of murder in the first degree. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above.' (Added L. 1940, ch. 202, effective Sept. 1, 1940.)

This section applies to all trial and grand jurors throughout New York City and was included specifically to save time in the examination of jurors by attorneys. It has proven successful in Richmond County, which has no special jurors."

Ninth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 20, 1943), p. 47:

"Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens.

The Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for which provision now exists only in the counties of New York, Bronx, Kings and Queens, be abolished as unnecessary and undesirable.

In its previous reports the Judicial Council has set forth at length the reasons for its recommendation (see Judicial Council Eighth Annual Report, pages 39-41; Fifth Annual Report, pages 42-43; Fourth Annual Report, pages 46-48; Third Annual Report, pages 34 and 121-128, to which the Council refers for facts and figures).

The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, which until 1940 had opposed this recommendation, has with

commendable open-mindedness now approved the Council's recommendation, stating in its Memo No. 71 for 1942,

> "We now believe with the Judicial Council (Eighth Annual Report 1942, p. 39) that
>
> 'The goal of a higher calibre of jurors *has now been achieved* under the new method of jury selection for the City of New York which went into effect September 1, 1940 upon recommendation of the Judicial Council and which now applies to *all* jurors those high standards which formerly were required only of special jurors.'
>
> "This Committee has been aware of some of the less desirable aspects of the so-called blue ribbon jury. Since our main opposition to abolition has been removed by the present provisions of the law regarding the selection of all jurors, this bill is approved."

Tenth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 15, 1944), pp. 41-42:

"Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens

The Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for which provision now exists only in the counties of New York, Bronx, Kings and Queens, be abolished as unnecessary and undesirable.

In its previous Reports, the Judicial Council has set forth at length the reasons for its recommendation (see Judicial Council Eighth Annual Report, pages 39-41; Fifth Annual Report, pages 42-43; Fourth Annual Report, pages 46-48; Third Annual Report, pages 34 and 121-128; to which the Council refers for facts and figures).

The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, which until 1940 had opposed this recommendation, has now approved the Council's recommendation, stating in its Memo No. 71 for 1942,

"We now believe with the Judicial Council (Eighth Annual Report 1942, p. 39) that

> 'The goal of a higher calibre of jurors *has now been achieved* under the new method of jury selection for the City of New York which went into effect September 1, 1940 upon recommendation of the Judicial Council and which now applies to *all* jurors those high standards which formerly were required only of special jurors.'

"This Committee has been aware of some of the less desirable aspects of the so-called blue ribbon jury. Since our main opposition to abolition has been removed by the present provisions of the law regarding the selection of all jurors, this bill is approved."

Eleventh Annual Report of The Judicial Council of the State of New York (Legislative Document No. 15, 1945), pp. 49-50:

"Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens.

"The Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for which provision now exists only in the counties of New York, Bronx, Kings and Queens, be abolished as unnecessary and undesirable.

In its previous Reports, the Judicial Council has set forth at length the reasons for its recommendation (see Judicial Council Tenth Annual Report, pages 41-42; Ninth Annual Report, page 47; Eighth Annual Report, pages 39-41; Fifth Annual Report, pages 42-43; Fourth Annual Report, pages 46-48; Third Annual Report, pages 34 and 121-128, to which the Council refers for facts and figures).

The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, which until 1940 opposed this recommendation, now approves it (Memo No. 71, 1942).

It is undisputed that the revised jury system for New York City recommended by the Judicial Council and in

operation since 1940 has succeeded in improving the quality of jurors generally by applying to all jurors the high standards which formerly were required only of special jurors.

Thus, the necessity for special jurors no longer exists."

Twelfth Annual Report of The Judicial Council of the State of New York (Legislative Document No. 17, 1946), p. 53:

"Renewed Recommendations

In renewing its recommendations as to the matters immediately following, the Judicial Council has nothing new to add. It therefore merely lists the recommendations and refers to the comments contained thereon by indicating the complete references to the respective subjects in the prior Annual Reports of the Judicial Council.

While these recommendations are not again amplified, in order to avoid repetition, the Judicial Council continues to stress their significance and desirability.

1. Abolition of Special Juries in the Counties of New York, Bronx, Kings and Queens. (see Eleventh Annual Report, pp. 49-50; Tenth Annual Report, pp. 41-42; Ninth Annual Report, p. 47; Eighth Annual Report, pp. 39-41; Fifth Annual Report, pp. 42-43; Fourth Annual Report, pp. 46-48; Third Annual Report, p. 34 and pp. 121-128)."